

# **EXHIBIT 9**

A. UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE  
CHRISTOPHER CORCORAN, ET AL., ) NO. C 15-3504 YGR  
)  
PLAINTIFFS, )  
VS. )  
CVS PHARMACY, INC., )  
)  
DEFENDANTS. )  
PAGES 1 - 53

OAKLAND, CALIFORNIA  
TUESDAY, MARCH 7, 2017

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR  
PLAINTIFFS:**

**PRITZKER LEVINE LLP  
180 GRAND AVENUE, SUITE 1390  
OAKLAND, CALIFORNIA 94612**

**BY: JONATHAN K. LEVINE, ESQUIRE  
ELIZABETH C. PRITZKER, ATTORNEY AT LAW**

**AND**

**STEIN MITCHELL CIPOLLONE BEATO & MISSNER  
LLP**

**1100 CONNECTICUT AVE. NW, SUITE 1100  
WASHINGTON, DC 20036**

**BY: ROBERT B. GILMORE, ESQUIRE**

FURTHER APPEARANCES ON NEXT PAGE.

REPORTED BY: KATHERINE WYATT, CSR NO. 9866

PROCEEDINGS REPORTED BY ELECTRONIC/MECHANICAL STENOGRAPHY;  
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

A P P E A R A N C E S (CONT'D.)

**ALSO FOR INDIRECT PURCHASER PLAINTIFFS:**

**HAUSFELD**

600 MONTGOMERY STREET

SUITE 3200

SAN FRANCISCO, CALIFORNIA 94111

**BY: BONNY E. SWEENEY, ATTORNEY AT LAW**

**FOR DEFENDANTS:**

**WILLIAMS & CONNOLLY LLP**

725 TWELFTH STREET, N.W.

WASHINGTON, DC 20005

**BY: GRANT A. GEYERMAN, ESQUIRE**

**F. LANE HEARD III, ESQUIRE**

**ENU MAINIGI, ATTORNEY AT LAW**

AND

**SWANSON & MCNAMARA**

300 MONTGOMERY STREET

SUITE 1100

SAN FRANCISCO, CALIFORNIA 94104

**BY: EDWARD W. SWANSON, ESQUIRE**

1 **MARCH 7, 2017**

**2:00 O'CLOCK P.M.**

2  
3 **P R O C E E D I N G S**

4 **THE CLERK:** OKAY. WE'LL DO THE CORCORAN VERSUS CVS  
5 NEXT.

6 OKAY. I'LL CALL THE CASE. YOU CAN COME TO THE PODIUM,  
7 COUNSEL.

8 CALLING CIVIL ACTION 15-3504, CORCORAN VERSUS CVS HEALTH  
9 CORPORATION.

10 COUNSEL, PLEASE COME FORWARD, AND STATE YOUR APPEARANCES.

11 **MS. SWEENEY:** GOOD AFTERNOON, YOUR HONOR. BONNY  
12 SWEENEY FROM HAUSFELD FOR THE PLAINTIFFS.

13 **MR. GILMORE:** GOOD AFTERNOON, YOUR HONOR. ROBERT  
14 GILMORE WITH STEIN MITCHELL FOR THE PLAINTIFFS.

15 **MR. LEVINE:** GOOD AFTERNOON, YOUR HONOR. JONATHAN  
16 LEVINE, PRITZKER LEVINE, FOR THE PLAINTIFFS.

17 **THE COURT:** GOOD AFTERNOON.

18 **MR. GEYERMAN:** GOOD AFTERNOON, YOUR HONOR. GRANT  
19 GEYERMAN FROM WILLIAMS & CONNOLLY FOR THE DEFENDANT.

20 **MR. HEARD:** LANE HEARD FROM WILLIAMS & CONNOLLY FOR  
21 CVS.

22 **THE COURT:** MR. HEARD, I DON'T HAVE YOUR NAME. HOW DO  
23 I SPELL YOUR LAST NAME?

24 **MR. HEARD:** HEARD, H-E-A-R-D.

25 **THE COURT:** OKAY.

1                   **MS. MAINIGI:**    ENU MAINIGI FROM WILLIAMS & CONNOLLY FOR  
2 THE DEFENDANTS.

3                   **MR. SWANSON:**   GOOD AFTERNOON, YOUR HONOR.   ED SWANSON  
4 OF SWANSON & MCNAMARA ON BEHALF OF THE DEFENDANTS.

5                   **THE COURT:**   ALL RIGHT.   GOOD AFTERNOON.

6                   **MR. NEHRU:**   GOOD AFTERNOON.   VIVAAN NEHRU FOR THE  
7 DEFENDANT.

8                   **THE COURT:**   WHICH OF THE FIRMS?

9                   **THE CLERK:**   DO YOU HAVE A CARD?

10                  **THE COURT:**   WHICH OF THE FIRMS?

11                  **MR. NEHRU:**   WILLIAMS & CONNOLLY.

12                  **THE COURT:**   AND HOW DO I SPELL YOUR LAST NAME?

13                  **MR. NEHRU:**   N-E-H-R-U.

14                  **THE COURT:**   OKAY.   GOOD AFTERNOON.

15                         ALL RIGHT.   WHO IS ARGUING?

16                  **MS. SWEENEY:**   YOUR HONOR, BONNY SWEENEY FROM HAUSFELD.  
17 MR. GILMORE AND I HAVE SPLIT UP THE ARGUMENT FOR PLAINTIFFS'  
18 COUNSEL.   MR. GILMORE IS ADDRESSING MOST OF THE CLASS  
19 CERTIFICATION ISSUES.   I WILL BE ADDRESSING ADEQUACY, ANY  
20 QUESTIONS PERTAINING TO ERISA THAT YOUR HONOR MIGHT HAVE AND  
21 MANAGEABILITY.

22                         MR. GILMORE WILL ALSO ADDRESS ANY QUESTIONS YOUR HONOR HAS  
23 ABOUT THE MOTIONS PERTAINING TO THE EXPERTS.

24                  **THE COURT:**   ALL RIGHT.   LET'S START WITH YOU, MR.  
25 GILMORE, THEN.

1 MR. HEARD?

2 MR. HEARD: YES.

3 THE COURT: ALL RIGHT.

4 OKAY. LET'S START FROM THE BEGINNING. WITH RESPECT TO THE  
5 ARGUMENTS ABOUT AVIS AND CORCORAN AND THEIR STANDING, I AM  
6 CONFUSED, MR. HEARD. IT SEEMS TO ME THAT IF SOMEONE HAS EVEN ONE  
7 RELEVANT TRANSACTION THAT IS SUFFICIENT EVEN IF SOME OTHER  
8 TRANSACTIONS DO NOT QUALIFY.

9 AM I WRONG WITH THAT BASIC PROPOSITION?

10 MR. HEARD: WE DON'T DISAGREE WITH THE PROPOSITION. WE  
11 DISAGREE WITH --

12 THE COURT: SO THE DISAGREEMENT COMES IN WHETHER OR NOT  
13 I'M GOING TO ALLOW THIS ADDITIONAL EVIDENCE THAT'S TEED UP IN THE  
14 MOTION TO STRIKE.

15 MR. HEARD: THAT'S CORRECT.

16 THE COURT: ALL RIGHT. SO WE'RE GOING TO MOVE ON FROM  
17 THERE. WE'LL GET TO THAT ISSUE LATER.

18 AND THEN, WITH RESPECT TO THE OVERCHARGE, ON THAT ISSUE,  
19 AGAIN, IT'S NOT CLEAR TO ME THAT THIS IS AN ISSUE OF STANDING.

20 IT SEEMS TO ME I NEED TO DECIDE IF THIS CASE GOES  
21 ANYWHERE. AND, FRANKLY, I HAVE TO TELL YOU RIGHT NOW,  
22 MR. GILMORE, I HAVE MY SIGNIFICANT CONCERNS. BUT WE'LL GET TO  
23 THOSE. WHETHER SOMEONE IS TYPICAL IF ALL THEY ARE DOING IS THEY  
24 HAVE PURCHASED PRESCRIPTIONS IN THE 30-DAY OR 60-DAY VERSUS THE  
25 90-DAY.

1 SO FOR ME IT'S NOT SO MUCH AN ISSUE OF STANDING AS IT IS  
2 TYPICALITY. HOW IS IT AN ISSUE OF STANDING?

3 MR. HEARD: WELL, I HAD NOT THOUGHT OF IT IN THOSE  
4 TERMS, YOUR HONOR. WE THOUGHT IT WAS AN ISSUE OF STANDING  
5 BECAUSE OUR PERSPECTIVE WAS THAT THIS ATTEMPT TO DEFINE INTO THE  
6 CLASS PERSONS WHO SUPPOSEDLY PAID MORE THAN A PRORATED PRICE --

7 THE COURT: RIGHT.

8 MR. HEARD: -- IS TO BASE THE DEFINITION ON A FICTION  
9 THAT THERE WAS, IN FACT, PRORATED CHARGED PRICES PAID BY HSP  
10 MEMBERS. SO OUR THINKING WAS THIS IS A CASE WHERE THE RIGOROUS  
11 ANALYSIS UNDER RULE 23 PENETRATES TO LOOK AT THE FACTS TO SEE IF  
12 THERE IS ANY FACTUAL BASIS TO SAY THAT THERE WAS A PRORATED PRICE  
13 PAID BY HSP MEMBERS.

14 AND WE BELIEVE THE STATE OF THE RECORD NOW, AFTER THE REPLY  
15 BRIEFS, IS THAT THERE'S NO EVIDENTIARY BASIS FOR SAYING THAT HSP  
16 MEMBERS EVER PAID THE PRORATED PRICE. NOBODY WAS PAYING \$3.33  
17 FOR A 30-DAY PRESCRIPTION OR THE EQUIVALENT FOR A 60-DAY  
18 PRESCRIPTION.

19 I SEE THAT YOUR HONOR -- IT'S RIGHT THAT THOSE PLAINTIFFS IN  
20 A WAY ARE NOT TYPICAL BECAUSE THEY REALLY DON'T EXIST. THAT'S  
21 NOT THE FUNDAMENTAL CHARGE HERE. THE CHARGE IS THAT THERE WAS  
22 SOMETHING UNFAIR BECAUSE PEOPLE PAID MORE THAN THE HSP PRICE,  
23 AND, IN FACT, MOST OF THE PLAINTIFFS PAID LESS.

24 THE COURT: RESPONSE.

25 MR. GILMORE: YOUR HONOR, THERE'S ABUNDANT EVIDENCE

1 THAT CVS, IN FACT, DID CHARGE PATIENTS FOR QUANTITIES SMALLER  
2 THAN THE STANDARD 90-DAY HSP QUANTITY PRICES THAT ARE LESS THAN  
3 THE STANDARD 90-DAY HSP PRICE.

4 THERE ARE OVER TWO-AND-A-HALF MILLION SUCH PURCHASES IN  
5 CVS'S TRANSACTION DATA. AND SO THE NOTION THAT THERE ISN'T ANY  
6 EVIDENCE --

7 **THE COURT:** DO YOU HAVE A PERSPECTIVE ON THE STANDING  
8 VERSUS TYPICALITY DISTINCTION I'M TRYING TO MAKE?

9 **MR. GILMORE:** I DO, YOUR HONOR. I MEAN, CVS BRIEFED IT  
10 AS STANDING. THERE ARE -- WE THINK THAT THE PLAINTIFFS, WHO  
11 HAVE -- THERE ARE ONLY FOUR PLAINTIFFS, I BELIEVE, WHO ONLY HAVE  
12 PRORATED QUALIFYING TRANSACTIONS. AND -- BUT THERE IS A  
13 SIGNIFICANT PORTION OF THE CLASS AS A WHOLE. SO THEIR CLAIMS  
14 CERTAINLY ARE TYPICAL FOR THE CLASS THAT WE SEEK TO CERTIFY AS A  
15 WHOLE.

16 AND AS I SAID, GETTING BACK TO THE EVIDENCE, THE RIGOROUS  
17 ANALYSIS SHOWS THAT, IN FACT, CVS DID CHARGE LESS THAN THE FULL  
18 PRICE FOR LESS THAN THE FULL QUANTITIES, IN NUMEROUS, MILLIONS OF  
19 TRANSACTIONS. WHAT CVS DID AS A WORKAROUND SYSTEM, BECAUSE LOTS  
20 OF PEOPLE DIDN'T WANT TO PAY THE FULL PRICE, IS THAT CVS WOULD  
21 RING UP THAT TRANSACTION AS --

22 **THE COURT:** YOU'RE GETTING OFF TOPIC.

23 **MR. GILMORE:** -- A NON-HSP TRANSACTION.

24 **THE COURT:** YOU'RE GETTING OFF TOPIC.

25 I WANT TO MOVE TO ASCERTAINABILITY.

1 ANYTHING ELSE TO BE SAID BRISENO? I MEAN, I KNOW THAT I'VE  
2 ASKED FOR SUPPLEMENTAL BRIEFING, BUT NOW'S YOUR OPPORTUNITY. I  
3 SEE IT NOW AS, YOU KNOW, WITHIN THE NORMAL RULE 23 ANALYSIS. AT  
4 LEAST THAT'S HOW I VIEWED IT. THAT'S HOW I THINK THE NINTH  
5 CIRCUIT IS ASKING US TO LOOK AT IT.

6 ANYTHING ELSE TO BE SAID? IF NOT WE'LL MOVE TO PREDOMINANCE  
7 AND COMMONALITY.

8 **MR. GILMORE:** YOUR HONOR, I THINK OUR PAPERS STATE OUR  
9 POSITION. WE FEEL THAT USING CVS'S OWN DATA WE CAN, IN FACT,  
10 HAVE -- ASCERTAIN WHO THE CLASS MEMBERS ARE.

11 **MR. HEARD:** NOTHING FURTHER, YOUR HONOR.

12 **THE COURT:** ALL RIGHT. SO THIS IS WHERE THE RUBBER  
13 MEETS THE ROAD, AS THEY SAY. THIS WHOLE CASE IS PREMISED ON  
14 MISREPRESENTATIONS. BUT THE EVIDENCE, AS NOW BEING SUBMITTED TO  
15 THE COURT, SUGGESTS OR SHOWS PRETTY CLEARLY THAT ALL OF THE  
16 REPRESENTATIONS WERE MADE TO THE PBM'S OR THE TPP'S, AND THE  
17 PLAINTIFFS HAVE TO DEAL WITH THAT FACT.

18 MOREOVER, THE PROBLEM I SEE IS THAT THESE ARE, WHAT, 50ISH,  
19 IN THAT GROUP, OF PBM'S AND 1200 CONTRACTS, ALL OF WHICH WERE  
20 SEPARATELY NEGOTIATED BY SOPHISTICATED PARTIES?

21 AND SOMEHOW YOU HAVE COMMON EVIDENCE TO SUGGEST THAT THERE  
22 HAVE BEEN AFFIRMATIVE MISREPRESENTATIONS?

23 YOU KNOW, I WENT BACK AND I LOOKED AT MY ORDER WHEN I  
24 ALLOWED THIS CASE TO PROCEED. AND IT CERTAINLY WASN'T MY  
25 UNDERSTANDING OF WHAT YOU THOUGHT YOU HAD. SO HERE WE ARE.

---

1 I JUST, AS I LOOKED AT THE EVIDENCE WITH RESPECT TO THE  
2 AFFIRMATIVE REPRESENTATIONS, WHICH IS ONE OF YOUR THEORIES,  
3 OMISSIONS, WHICH IS YOUR SECOND THEORY, AND THEN, PERHAPS,  
4 INDIRECT MISREPRESENTATIONS, I DON'T SEE HOW YOU GET OVER THIS  
5 HURDLE THAT ALL OF THIS WAS NEGOTIATED KNOWINGLY AND  
6 INTELLIGENTLY BY SOPHISTICATED PARTIES IN TERMS OF WHAT YOU'RE  
7 CLAIMING YOUR PROBLEM IS.

8 THAT'S THE CRUX. GO AHEAD.

9 MR. GILMORE: YOUR HONOR, WE THINK THAT THE PBM  
10 TESTIMONY, AS ELICITED IN CROSS-EXAMINATION IN THEIR DEPOSITIONS,  
11 ACTUALLY SUPPORTS OUR CASE FOR THESE REASONS. FIRST OF ALL,  
12 CVS'S WHOLE ARGUMENT THAT THERE ARE THESE SECRET, UNDOCUMENTED  
13 UNDERSTANDINGS. THERE'S NOT ANY PAPER. THERE'S NO WRITTEN  
14 UNDERSTANDING THAT MEMORIALIZE WHAT THESE AFTER-THE-FACT  
15 LITIGATION DECLARATIONS REFLECT.

16 AND WHEN WE LOOK AT THE CONTRACTS, INTEGRATED, NEGOTIATED  
17 CONTRACTS BETWEEN THE PBM'S AND CVS, THEIR LANGUAGE, SPECIFICALLY  
18 THE DEFINITIONS OF "USUAL AND CUSTOMARY PRICE," ON THEIR FACE  
19 WOULD REQUIRE PRICES SUCH AS THE HSP PRICE TO BE SUBMITTED AS  
20 USUAL AND CUSTOMARY PRICES.

21 THE COURT: LET ME ASK YOU SOMETHING. DON'T THOSE 1200  
22 CONTRACTS DEFINE "USUAL AND CUSTOMARY"? I THINK I HAVE EXAMPLES  
23 OF VARIOUS DEFINITIONS.

24 MR. GILMORE: YOUR HONOR --

25 THE COURT: "YES" OR "NO"?

1                   **MR. GILMORE:**   THEY DO.   AND THOSE DEFINITIONS ARE ALL  
2 MATERIALLY THE SAME.   THERE'S ONE DISTINCTION WHICH WE ACCOUNTED  
3 FOR IN OUR REVISED CLASS DEFINITION, BUT THEY ARE ALL MATERIALLY  
4 THE SAME.   AND WE KNOW THIS FOR A NUMBER OF REASONS.

5           FIRST OF ALL, CVS IN ITS OPPOSITION AT PAGE TEN SAID THAT  
6 ALL OF THE DEFINITIONS OF U & C SHARE A COMMON ELEMENT, WHICH IS  
7 THAT IT'S THE PRICE THAT CASH CUSTOMERS PAY.

8           AND WE SHOW THROUGH THE TRANSACTION DATA, WE SHOW THROUGH  
9 CVS'S INTERNAL DOCUMENTS THAT, A:   THIS IS DESCRIBED AS A CASH  
10 PROGRAM OR AS A CASH OFFERING; THAT IT WAS -- THE HSP PRICES ARE  
11 THE SINGLE MOST COMMON PRICES PAID BY CASH CUSTOMERS, SO -- AND  
12 WHEN WE LOOK AT THE ARGUMENTS AND ANALYSIS FROM THE GARBE CASE,  
13 FOR INSTANCE, THIS PROGRAM FITS THE DEFINITION IN THESE  
14 CONTRACTS.

15           SO CVS HAS BROUGHT WITNESSES TO COME IN AND SAY:

16                   "WELL, THERE'S NO PAPER, BUT WE HAD THIS UNDERSTANDING  
17 THAT THESE DIDN'T NEED TO BE SUBMITTED AS USUAL AND  
18 CUSTOMARY PRICES, DESPITE WHAT THE PLAIN LANGUAGE OF THE  
19 CONTRACTS REFLECTS."

20           AND -- BUT WHEN WE ASKED THESE WITNESSES IN THEIR  
21 DEPOSITIONS, IT'S CLEAR THAT EVEN THEIR TESTIMONY THAT THEY ARE  
22 GIVING NOW IS NOT INFORMED.   IN FACT, IT'S BASED ON  
23 MISREPRESENTATIONS.   IT'S BASED ON UNTRUTHS.

24           THEIR POSITIONS THAT THEY STATE IN THEIR DECLARATIONS, THAT  
25 THE HSP PROGRAM PRICES DIDN'T NEED TO BE SUBMITTED AS USUAL AND

1 CUSTOMARY PRICES WERE BASED ON THEIR BELIEF THAT THIS WAS  
2 LEGITIMATE.

3 WE USE THE WORDS OF THE ONE DECLARANTS, AMBER COMPTON, "A  
4 BONA FIDE PROGRAM." WE ASKED WHAT THAT MEANT. THAT MEANT THAT  
5 THE ONLY WAY YOU COULD GET THESE PRICES WAS IF YOU WERE IN THE  
6 PROGRAM.

7 **THE COURT:** LET ME TAKE AN EXAMPLE. LET'S SAY YOU TOOK  
8 JUST ONE OF THOSE CONTRACTS. YOU'RE A CONSUMER. YOU THINK  
9 YOU'VE BEEN WRONGED, AND YOU HAVE THE EXACT SAME ISSUE YOU HAVE  
10 HERE TODAY THAT YOU WANT ME TO CERTIFY A CLASS. THERE ARE 11  
11 DIFFERENT STATES. IF THAT PERSON BROUGHT A LAWSUIT THE JUDGE  
12 WOULD HAVE TO HAVE THE CONTRACT BETWEEN THE PBM AND CVS AND WOULD  
13 HAVE TO UNDERSTAND WHAT THOSE PARTIES BELIEVED WHEN THEY  
14 NEGOTIATED THAT CONTRACT IN ORDER TO MAKE ANY SENSE OF THE CLAIM  
15 OF WHETHER OR NOT THERE WAS SOME FRAUD INVOLVED IN IT.

16 SO HOW CAN YOU AVOID -- NOW WHAT YOU'VE DONE IS YOU'VE  
17 MULTIPLIED THAT 1200 TIMES. HOW CAN I AVOID THAT CRITICAL LINK?

18 **MR. GILMORE:** THE CONTRACTS AS RELEVANT HERE ARE  
19 MATERIALLY THE SAME. THEY ALL INVOLVE WHAT'S CALLED THE LOWER OF  
20 U & C PRICING, WHICH IS A MECHANISM THAT THE CONTRACTS SHOW THAT  
21 THE WITNESSES TESTIFIED, BOTH CVS AND DECLARANTS. SAID WORKS THE  
22 SAME. IN FACT, CVS'S BUSINESS TREATS ALL OF THEIR CONTRACTS THE  
23 SAME.

24 THE PRICE THAT CVS WILL BE PAID IN AN INSURANCE TRANSACTION  
25 IS THE LOWER OF SOME CALCULATED NUMBER UNDER THE CONTRACT OR WHAT

1 CVS HAS REPORTED AS ITS USUAL AND CUSTOMARY PRICE.

2 THAT'S LOWER U & C PRICING. AND THAT IS THE STANDARD  
3 PRICING ALL OF THE WITNESSES HAVE SAID THIS IS COMMONPLACE. IT  
4 IS ESSENTIALLY UNIFORM THROUGHOUT CVS'S BUSINESS.

5 **THE COURT:** ALL RIGHT. RESPONSE.

6 **MR. HEARD:** YOUR HONOR, EXACTLY CORRECT. ONE CANNOT  
7 AVOID IN THIS CASE ASKING EACH PBM AS TO EACH CONTRACT WHAT THAT  
8 CONTRACT REQUIRED. SO ON THE QUESTION OF PREDOMINANCE, YOUR  
9 HONOR IS GOING TO BE ASKING:

10 "WHAT'S THE TRIAL EVIDENCE GOING TO BE? AND IS THAT  
11 TRIAL EVIDENCE INDIVIDUAL TO A PLAINTIFF OR IS IT COMMON?"

12 AND THERE IS NO COMMON ANSWER BECAUSE EACH PLAINTIFF HAS ITS  
13 OWN HEALTH PLAN. THAT HEALTH PLAN IS CONTRACTED WITH A  
14 PARTICULAR PBM. AND SO FOR EACH PLAINTIFF ONE HAS TO ASK WHAT  
15 THAT PBM THAT WAS ADMINISTERING THAT PLAINTIFF'S CONTRACT  
16 UNDERSTOOD TO BE THE REQUIREMENT.

17 AND THE EVIDENCE IN THE RECORD SHOWS THAT WE'VE GOT TO GO  
18 PBM BY PBM, PLAINTIFF BY PLAINTIFF TO UNDERSTAND WHAT THEIR  
19 UNDERSTANDING OF THE REQUIREMENT WAS. AND THE EVIDENCE IN THE  
20 RECORD, OF COURSE, SHOWS NOW FROM THE FIVE LARGEST PBM'S THAT  
21 THEY BELIEVE THERE WAS NO REQUIREMENT ON THE PART OF CVS TO  
22 REPORT MEMBER PRICES AS U & C PRICES.

23 BUT ONE CAN ONLY KNOW THAT BY GOING PBM BY PBM FOR EACH  
24 PLAINTIFF AND CLASS MEMBER. THAT'S WHY INDIVIDUAL PROOF IS GOING  
25 TO PREDOMINATE. OF COURSE, IF THERE'S NO REQUIREMENT TO REPORT

1 MEMBER PRICE, THERE'S NO MISREPRESENTATION. THE CASE DIES RIGHT  
2 THERE.

3 BUT IT'S INDIVIDUALIZED INQUIRY, CONTRACT BY CONTRACT, PBM  
4 BY PBM.

5 **MR. GILMORE:** YOUR HONOR, MAY I RESPOND BRIEFLY TO  
6 THAT?

7 **THE COURT:** YOU MAY, AND THEN I WOULD LIKE TO HEAR ANY  
8 ARGUMENTS YOU MIGHT HAVE ON GARBE, MR. HEARD.

9 GO AHEAD.

10 **MR. GILMORE:** SURE. THERE IS UNIFORM ANSWERS, COMMON  
11 ANSWERS TO COMMON QUESTIONS JUST ON THE RECORD OF THIS CASE.  
12 WHEN WE DEPOSED THE PBM WITNESSES THAT CVS HAS BROUGHT IN, CVS  
13 ITSELF HAS POINTED OUT THAT THESE PBM'S REPRESENT 75 PERCENT OF  
14 THE CLASS.

15 WE ASKED THEM:

16 "DID YOU GET CVS'S ACTUAL CASH TRANSACTION DATA?"

17 NO, THEY DIDN'T.

18 "DID YOU KNOW THAT CVS ALLOWED PEOPLE WHO WEREN'T IN  
19 THE PROGRAM TO PAY THESE SAME PRICES?

20 "NO, WE DIDN'T KNOW THAT.

21 "AND IF YOU DID KNOW THAT WOULD YOU HAVE EXPECTED CVS  
22 TO SUBMIT THESE HSP PRICES AS THE USUAL AND CUSTOMARY  
23 PRICES?"

24 AND THEY SAID:

25 "YES, IF IT WAS NOT CONFINED TO THE CLASS MEMBERS THEN

1           THESE NEEDED TO BE SUBMITTED AS USUAL AND CUSTOMARY PRICES."

2           **THE COURT:**   SO WHAT'S YOUR RESPONSE?

3           **MR. GILMORE:**   THAT'S THE COMMON ANSWER.   SORRY.

4           **THE COURT:**   WHAT'S YOUR RESPONSE TO THAT?

5           **MR. HEARD:**   IT'S AN INDICATION, AGAIN, OF JUST HOW  
6 INDIVIDUALIZED THE EVIDENCE IS BECAUSE THIS GOES TO:  WHAT DID  
7 THE PBM'S KNOW?  AND THE EVIDENCE IS DISTINCT.

8           **THE COURT:**   IF THEY ARE ALL SAYING THAT YOU HAVE TO  
9 DISCLOSE IT, WHICH IS WHAT HE JUST REPRESENTED TO ME, AND THESE  
10 ARE THE FIVE MAJOR PEOPLE.

11          **MR. HEARD:**   YES.

12          **THE COURT:**   AT CLASS CERTIFICATION WE DON'T TRY THE  
13 ENTIRE CASE.

14          **MR. HEARD:**   NO.

15          **THE COURT:**   SO WHY ISN'T THAT SUFFICIENT?

16               WELL, FIRST OF ALL, TELL ME IF HE'S MISREPRESENTING THE  
17 RECORD.  AND SECOND, THEN ANSWER MY QUESTION.

18          **MR. HEARD:**   YES.  THE RECORD IS THAT, OF COURSE, THE U  
19 & C PRICE HAD TO BE PRESENTED TO THE PBM.  WHERE THERE'S A  
20 DIFFERENCE AND WHY YOU HAVE TO GO PBM BY PBM IS WHAT DID THEY  
21 EXPECT CVS TO REPORT?

22               THE EVIDENCE FROM THE FIVE LARGEST IS THEY DID NOT EXPECT  
23 THEM TO REPORT THE MEMBER PRICE.  AND THEY DID SO BECAUSE OF  
24 DIFFERENT CRITERIA.

25               FOR EXAMPLE, EXPRESS SCRIPTS SAID THE MOST IMPORTANT

1 CHARACTERISTIC ABOUT A MEMBER PROGRAM WAS WHETHER THE INDIVIDUAL  
2 CUSTOMER HAD TO AFFIRMATIVELY ENROLL IN THE PROGRAM.

3 MEDCO, ON THE OTHER HAND, SAID THE KEY CHARACTERISTIC OF A  
4 MEMBER PROGRAM WAS THE PRICE. THEY ARE APPLYING DIFFERENT  
5 CRITERIA. DIFFERENT ELEMENTS OF THE MEMBERSHIP PROGRAM ARE  
6 IMPORTANT TO THEM, AND ONE CAN ONLY KNOW THAT IF ONE GOES  
7 INDIVIDUALLY AND PRESENTS INDIVIDUAL EVIDENCE FOR EACH PBM.

8 **THE COURT:** DO YOU WANT TO --

9 **MR. GILMORE:** YOUR HONOR, MAY I RESPOND TO THAT?

10 **MR. HEARD:** YOUR HONOR?

11 **THE COURT:** GARBE, DO YOU HAVE ANYTHING TO SAY ABOUT  
12 GARBE?

13 **MR. HEARD:** I DO. I THINK IT'S DISTINGUISHABLE FOR A  
14 COUPLE OF REASONS, YOUR HONOR, THE PRINCIPAL ONE BEING THAT GARBE  
15 IS QUITE UNUSUAL IN ITS PROCEDURAL POSTURE AND IN THE EVIDENTIARY  
16 RECORD IT DISTINGUISHES FROM THIS CASE.

17 THE DISTRICT COURT THERE WAS QUITE CLEAR THAT IT WAS RULING  
18 ON AN INDUSTRY UNDERSTANDING OF UNIFORM -- USUAL AND CUSTOMARY  
19 PRICE SEPARATE AND APART FROM WHAT ANY CONTRACT PROVIDED.

20 AND THE KEY LANGUAGE THERE IS IT SAYS "USUAL AND CUSTOMARY."  
21 AND THIS IS AT PAGE 1015 OF THE OPINION.

22 "'USUAL AND CUSTOMARY'" IS DEFINED BY THE RELEVANT  
23 CONTRACT OF THE PBM HANDLING THE CLAIMS PROCESSING FOR THESE  
24 PROGRAMS."

25 AND WHERE THE PLAINTIFF IN THAT CASE SAID THE NCPDP

1 DEFINITION CONTROLLED, THE COURT SAID:

2 "WE DISAGREE."

3 THE COURT SAID:

4 "IT WOULD BE NONSENSICAL TO FIND THAT THESE CONTRACTUAL  
5 DEFINITIONS WOULD NOT CONTROL THE SPECIFIC CONTRACT."

6 SO THAT ITS ULTIMATE HOLDING AT PAGE 1016 WAS:

7 "ULTIMATELY, THE COURT HOLDS THAT THE NCPDP DEFINITION  
8 OF 'CASH PRICE TO THE GENERAL PUBLIC' CONTROLS UNLESS,  
9 UNLESS FURTHER DEFINED BY RELEVANT CONTRACT."

10 AND IN THAT CASE THE COURT DID NOT HAVE CONTRACTS BEFORE IT.  
11 AS YOUR HONOR SAYS, THERE'S MORE THAN A THOUSAND CONTRACTS THAT  
12 THE PLAINTIFFS HAVE PUT BEFORE YOU. AND THE COURT HAD NO  
13 EVIDENCE BEFORE IT, AS YOUR HONOR HAS EVIDENCE, THAT THE PBM'S  
14 CONSTRUED THESE CONTRACTS IN A WAY CONTRARY TO THE PLAINTIFFS'  
15 ALLEGATION.

16 **THE COURT:** ALL RIGHT. MR. GILMORE.

17 **MR. GILMORE:** WITH RESPECT TO GARBE, WHAT COUNSEL  
18 DESCRIBES GARBE IS INCORRECT. THE PLAINTIFFS' EXPERT, SUSAN  
19 HAYES, DID AN EXHAUSTIVE ANALYSIS OF THE CONTRACTS AND WENT  
20 THROUGH. AND THE PLAINTIFFS SUBMITTED TO THE COURT:

21 "HERE'S A THOUSAND CONTRACTS."

22 AND I SUSPECT THAT THE CONTRACTS THAT KMART HAD ARE PROBABLY  
23 VERY SIMILAR TO THE ONES THAT CVS HAS AND --

24 **THE COURT:** WE DON'T HAVE ANY SIMILAR ANALYSIS BY YOUR  
25 EXPERTS, THOUGH.

1           **MR. GILMORE:** WELL, WE HAVE --

2           **THE COURT:** AM I CORRECT?

3           **MR. GILMORE:** NO, I DON'T THINK THAT IS CORRECT. DR.

4 NAVARRO HAS LOOKED AT DEFINITIONS IN CVS CONTRACTS.

5           **THE COURT:** HOW MANY?

6           **MR. GILMORE:** I'M NOT SURE. I MEAN, IT'S --

7           **THE COURT:** MORE THAN TEN?

8           **MR. GILMORE:** I THINK THAT HE SAID IT WAS IN THE TEENS.

9 I DON'T REMEMBER THE EXACT NUMBER. BUT WE HAVE CVS'S CONTRACT  
10 CHART. CVS SUBMITTED A CONTRACT CHART TO US.

11           AND WHEN YOU LOOK THROUGH THEIR DEFINITIONS, BOTH IN THAT  
12 CHART AS WELL AS IN THE BRIEF, WE SEE THAT THERE'S FUNDAMENTAL  
13 SIMILARLY.

14           LET ME GO BACK TO THE POINT ABOUT THE PBM TESTIMONY, YOUR  
15 HONOR, BECAUSE IN EXHIBIT 62 TO OUR REPLY BRIEF, WE EXCERPT THE  
16 PBM'S DEPOSITION TESTIMONY. AND I'LL READ AN EXAMPLE.

17           **THE COURT:** WE DON'T HAVE ALL DAY, BUT GO AHEAD.

18           **MR. GILMORE:** I'LL MAKE THIS QUICK. THIS IS FROM BILL  
19 BARRY. I HAVE ONE COPY, BUT I CAN HAND IT TO THE COURT. IT'S  
20 EXHIBIT 62 IN OUR REPLY BRIEF.

21           **THE COURT:** NO, I'M JUST ABOUT TO REMIND YOU WHEN  
22 LAWYERS READ THEY BECOME MOTORIZED.

23           **MR. GILMORE:** I WILL TRY AND RESPECT THE COURT REPORTER  
24 AND YOUR HONOR AND TRY AND READ SLOWLY.

25           WE ASKED HIM -- I ASKED HIM. I TOOK HIS DEPOSITION. AND I

1 ASKED MR. BARRY:

2 "IF THE HEALTH SAVINGS PASS PRICES WERE THE MOST COMMON  
3 PRICES THAT CVS CHARGED CASH-PAYING CUSTOMERS WHO WERE NOT  
4 ENROLLED IN THE HSP PROGRAM, WOULD MEDIMPACT HAVE WANTED  
5 THOSE PRICES TO BE REPORTED AS USUAL AND CUSTOMARY PRICES?

6 "ANSWER: IF BY NATURE CVS WAS PROVIDING THAT PRICE  
7 POINT TO A CONSUMER, NO ACTION REQUIRED OR REQUESTED BY THE  
8 CONSUMER, AND THEY SIMPLY WENT OUT AND PROVIDED THEIR PRICE  
9 POINT. LET'S JUST SAY, FOR EXAMPLE, THAT WAS \$10. WE WOULD  
10 EXPECT THAT \$10 TO BE CVS'S USUAL AND CUSTOMARY PRICE."

11 THE OTHER WITNESSES GAVE SIMILAR ANSWERS. AND OUR DATA, AND  
12 DR. HAYES' -- PROFESSOR HAYES' ANALYSIS SHOWS THAT TIME AND  
13 AGAIN, CVS CHARGED NON-HSP MEMBERS THESE HSP PRICES.

14 SO IT WAS NOT AN EXCLUSIVE CLUB. SO WE BELIEVE THAT  
15 CERTAINLY THIS TESTIMONY WHICH WE THINK IS UNIFORM, WE PUT IN  
16 FRONT OF THE COURT FROM THE WITNESSES THAT CVS PICKED AND  
17 SUBMITTED DECLARATIONS FROM, DOES GIVE COMMON ANSWERS TO COMMON  
18 QUESTIONS.

19 **THE COURT:** LET'S MOVE TO RELIANCE, WHICH HAS SIMILAR  
20 ISSUES.

21 FIRST OF ALL, WITH RESPECT TO WHETHER OR NOT THERE'S ANY  
22 EVIDENCE TO SHOW -- WELL, ANY EVIDENCE WHERE YOU CAN PROVE THE  
23 RELIANCE COMPONENT WITH RESPECT TO THE PBM'S YOU DIDN'T REALLY  
24 TAKE THAT HEAD-ON IN YOUR OPPOSITION. SO DO YOU WANT TO DO SO  
25 NOW? OR DO YOU WANT TO STAND ON YOUR OWN BRIEFS?

---

1                   **MR. GILMORE:** IN OUR REPLY BRIEF -- WELL, I THINK THE  
2 TESTIMONY -- I THINK WE ACTUALLY DID ADDRESS THIS IN OUR REPLY  
3 BRIEF, YOUR HONOR. THAT THE PBM DEPOSITION TESTIMONY REVEALED  
4 THAT THEY WEREN'T GIVEN THE TRUTH. THEY WEREN'T GIVEN WHAT CVS'S  
5 ACTUAL CASH DATA WAS. AND THEY WEREN'T TOLD THAT CVS WAS  
6 CHARGING THE HSP PRICES TO NON-HSP MEMBERS.

7                   AND SO THEY HAD RELIED ON THE REPRESENTATION, CVS'S  
8 DESCRIPTION OF THIS PROGRAM AS AN EXCLUSIVE PROGRAM. THAT'S  
9 ACTUALLY MEMORIALIZED IN THE DECLARATIONS THAT THEY SUBMITTED.

10                  SO WE THINK THAT THAT CERTAINLY WITH RESPECT TO THE PBM'S  
11 THAT CVS HAS BROUGHT IN, THAT THERE IS RELIANCE IN THAT RESPECT,  
12 AND IT'S COMMON. IT'S COMMON EVIDENCE THAT SHOWS THAT.

13                  **THE COURT:** RESPONSE.

14                  **MR. HEARD:** I THINK THAT'S MISTAKEN IN TWO REGARDS,  
15 YOUR HONOR. FIRST OF ALL, ON THE FUNDAMENTAL LEVEL IT'S  
16 INDIVIDUALIZED EVIDENCE NECESSARILY, AS RELIANCE EVIDENCE ALMOST  
17 ALWAYS IS, BECAUSE TAKE AN INDIVIDUAL PLAINTIFF, TAKE PLAINTIFF  
18 ODORISIO, FOR EXAMPLE.

19                  IN HIS CASE, THE QUESTION IS: WHAT DID HIS PBM RELY?  
20 THAT'S EVIDENCE PECULIAR TO HIS CASE AND NOT IN THE CASE OF A  
21 PLAINTIFF WHOSE HEALTH PLAN WAS ADMINISTERED BY A DIFFERENT PBM.

22                  DID THE PBM RELY? NOT IF THEY UNDERSTOOD THAT CVS WAS  
23 NOT REQUIRED TO SUBMIT THE MEMBER PRICE AS THE U & C PRICE.

24                  BUT THERE'S A SECOND LEVEL OF RELIANCE, YOUR HONOR, THAT IS  
25 INDIVIDUAL TO THE INDIVIDUAL PLAINTIFFS' CASE.

1                   **THE COURT:** WELL, WE'RE NOT THERE YET. I WANTED TO  
2 MAKE SURE THAT WE'VE ADDRESSED -- DO YOU HAVE ANYTHING ELSE TO  
3 SAY ON THE RELIANCE BY THE PBM'S.

4                   **MR. GILMORE:** NO, YOUR HONOR.

5                   **MR. HEARD:** IF I MAY, YOUR HONOR, I UNDERSTOOD MR.  
6 GILMORE TO ARGUE -- AND IT'S AN ALLEGATION NOT IN THE COMPLAINT  
7 BUT IT'S CERTAINLY AN ARGUMENT THEY ARE NOW MAKING, WHICH THE  
8 WHOLE MEMBERSHIP PROGRAM IS A SHAM. WE DIDN'T REALLY CHARGE A  
9 MEMBERSHIP PRICE. WE DIDN'T REALLY ENROLL PEOPLE IN THE PROGRAM.  
10 AND THAT HAD PBM'S KNOWN THAT THEY WOULD HAVE TAKEN A DIFFERENT  
11 VIEW.

12                   BUT THAT INTRODUCES THE WHOLE CONCEPT OF: DID THOSE PBM'S  
13 REASONABLY RELY? THE EVIDENCE IN THE RECORD IS THAT THEY KNEW  
14 ABOUT THIS PROGRAM. THEY KNEW ABOUT SIMILAR PROGRAMS BY WALGREEN  
15 AND RITE AID AND HEB AND KROGER AND KMART AND WALMART. AND MEDCO  
16 EVEN TESTIFIED THAT THEY HAD A SECRET SHOPPER PROGRAM. THEY WENT  
17 OUT FOR THEMSELVES TO SEE WHETHER THE PROGRAM WAS A SHAM OR NOT.

18                   SO WE WOULD HAVE TO GO PBM BY PBM TO SEE WHETHER THEY  
19 REASONABLY RELIED. IF THEY DIDN'T KNOW THAT THE PROGRAM WAS  
20 LEGITIMATE, WHY DIDN'T THEY KNOW? BECAUSE LIKE MEDCO THEY COULD  
21 HAVE GONE OUT AND FOUND OUT ON THEIR OWN.

22                   AND, AGAIN, THAT WILL BE EVIDENCE PECULIAR TO A PARTICULAR  
23 PBM FOR THAT PBM'S MEMBERS. ITS CUSTOMERS, ITS PLAINTIFFS.

24                   **THE COURT:** WITH RESPECT TO THE RELIANCE BY THE  
25 INDIVIDUAL PLAINTIFFS THEMSELVES, AND THEIR CONTINUED USE OF OR

1 PATRONAGE OF CVS, CAN'T THAT KIND OF EVIDENCE BE DEALT WITH IN  
2 TERMS OF EITHER A CLASS DEFINITION OR ADMINISTRATION, ANYTHING  
3 LIKE THAT?

4 **MR. HEARD:** I DON'T BELIEVE SO, YOUR HONOR, BECAUSE  
5 THERE ARE THREE ASPECTS TO THIS, PROBABLY AT LEAST TWO OR THREE  
6 ASPECTS. ON THE FIRST LEVEL, THE CONTINUED PATRONAGE ITSELF  
7 SHOWS, OR A JURY COULD FIND, THAT IT'S EVIDENCE THAT THEY DIDN'T  
8 RELY.

9 BUT PLAINTIFFS HAVE NOW COME BACK AND ARGUED THAT IT WAS  
10 SOMEHOW INDISPENSABLE THAT THEY FILLED THEIR PRESCRIPTIONS AT  
11 CVS. AND THAT INTRODUCES A WHOLE OTHER LEVEL OF INDIVIDUALIZED  
12 EVIDENCE BECAUSE THEN WE'RE INTO QUESTIONS FOR EACH. THEY ARE  
13 INDIVIDUAL TO EACH PLAINTIFF: DID THEY, IN FACT, PATRONIZE  
14 MULTIPLE PHARMACIES DURING THE CLASS PERIOD SHOWING THAT OTHER  
15 PHARMACIES WERE AVAILABLE?

16 WHEN THEY SWITCHED PHARMACIES, AS MANY OF THEM DID, AS A  
17 MAJORITY OF THEM DID DURING THE CLASS PERIOD, WHY DID THEY SWITCH  
18 AND HOW DIFFICULT WAS IT FOR THEM TO SWITCH?

19 IF THEY DIDN'T SWITCH BUT THEY ARE SIMPLY SAYING:

20 "WE HAD NO CHOICE BUT TO SHOP AT CVS," WERE THERE OTHER  
21 PHARMACIES AVAILABLE? THAT'S INDIVIDUALIZED IN THEIR  
22 NEIGHBORHOOD AND THEIR CIRCUMSTANCES.

23 ALL OF THAT IS INDIVIDUALIZED EVIDENCE THAT I DON'T THINK  
24 CAN BE DEFINED OUT OF THE CLASS BUT REQUIRES INQUIRY CLASS MEMBER  
25 BY CLASS MEMBER AS TO WHY THEY DID WHAT THEY DID.

---

1           **THE COURT:** MR. GILMORE, RESPONSE.

2           **MR. GILMORE:** YES, YOUR HONOR. WITH RESPECT TO THE  
3 ADMINISTRATION OR CLASS DEFINITION, WE THINK IF THE COURT THINKS  
4 THAT THIS IS A CONCERN THAT MAY IMPACT THE CLASS, THEN THE  
5 RESOLUTION AT MOST WOULD BE TO CUT OFF THE CLASS DEFINITION UPON  
6 THE FILING OF THE SUIT.

7           BUT OUR ARGUMENT IS THIS: THESE ARE NOT DISCRETIONARY  
8 PURCHASES, SO WE'RE NOT TALKING ABOUT --

9           **THE COURT:** WELL, THEY ARE NOT DISCRETIONARY PURCHASES,  
10 BUT THEY CERTAINLY ARE -- THERE'S PLENTY OF PHARMACIES AROUND AND  
11 THEY ARE RIGHT ACROSS THE STREET FROM EACH OTHER. SO WHETHER OR  
12 NOT YOU GO TO CVS OR RITE AID OR SOME OTHER -- WALGREENS, THAT'S  
13 NOT MANDATORY IN ANY WAY EVEN IF YOUR PRESCRIPTIONS -- YOUR NEED  
14 FOR THOSE PRESCRIPTIONS ARE.

15           **MR. GILMORE:** IT'S NOT. THERE IS, THOUGH, AN IMPORTANT  
16 OBJECTIVE IN THE HEALTHCARE INDUSTRY THAT CVS HAS ESPOUSED. IT'S  
17 ADMITTED THAT CONTINUITY OF CARE IS AN IMPORTANT HEALTHCARE  
18 OBJECTIVE.

19           **THE COURT:** THAT MAY BE, BUT CAN YOU REALLY SAY THAT  
20 ALL CLASS MEMBERS ACROSS 11 STATES SOMEHOW -- ESPECIALLY,  
21 BECAUSE I SUSPECT MANY CLASS MEMBERS ARE ELDERLY -- HAVE SOME  
22 NOTION THAT, YOU KNOW, CENTRALIZED -- AT THIS POINT IN TIME,  
23 CENTRALIZED PHARMACEUTICAL PRACTICES IS SOMETHING THAT THEY ALL  
24 AGREE ON?

25           **MR. GILMORE:** WITH RESPECT TO THE CLASS, THE CLAIMS

1 THAT WE'VE ASSERTED AND WE POINT TO THE AUTHORITIES, INCLUDING  
2 YOUR HONOR'S DECISION IN THE BIAS CASE AND THE U.S. FOOD CASE  
3 THAT BIAS CITED SHOWS THAT THERE'S A PRESUMPTION OF RELIANCE FOR  
4 THE CLASS WHEN YOU HAVE FINANCIAL MISREPRESENTATIONS, UNIFORM  
5 MISREPRESENTATIONS AT THE POINT --

6 **THE COURT:** BY THE WAY, BIAS, YOU HAVE NO IDEA ABOUT  
7 THAT CASE, DO YOU? HAVE YOU TALKED TO THE LAWYERS IN THAT CASE?  
8 THERE WERE THREE BANK CASES, WELLS FARGO, CHASE AND CITIBANK.  
9 TWO OF THEM WERE ULTIMATELY RESOLVED FOR THE DEFENDANT'S FAVOR.  
10 ONLY BIAS HAS MOVED FORWARD FOR THE PLAINTIFFS.

11 DO YOU UNDERSTAND THOSE CASES? BECAUSE I SPENT YEARS WITH  
12 THEM.

13 **MR. GILMORE:** I'M QUITE SURE YOU KNOW THEM BETTER THAN  
14 I DO, YOUR HONOR. I'M ONLY GOING BY YOUR REPORTED OPINIONS.

15 **THE COURT:** MY ONLY SUGGESTION IS THAT YOU SHOULD  
16 ALWAYS BE CAREFUL. EVERYONE IN THE COURTROOM SHOULD BE CAREFUL  
17 CITING CASES BACK TO JUDGES THAT THEY WROTE, BECAUSE YOU DON'T  
18 QUITE UNDERSTAND THE CONTEXT OF THOSE CASES.

19 BUT GO AHEAD.

20 **MR. GILMORE:** WELL, WITH THAT WARNING, I'LL TRY AND  
21 PROCEED AND APOLOGIZE IF I MISSTATE THE CASE. WE RECOGNIZE THAT  
22 WE SAW AT LEAST TWO CASES OF YOURS THAT DEALT WITH SOME OF THE  
23 SAME KINDS OF ISSUES HERE, THE STICK CASE AND THE BIAS CASE.

24 AND WE ARGUED, AND I THINK SHOWED WHY, THE BIAS CASE IS THE  
25 ONE THAT IS MORE APT IN TERMS OF THE COMMON ELEMENTS THAT THE

1 VARIATIONS IN THE CONTRACTS WEREN'T SOMETHING THAT PREVENTED  
2 CLASS CERTIFICATION IN THAT CASE.

3 **THE COURT:** THERE'S NOT THE SAME COROLLARY. MOVE ON.

4 **MR. GILMORE:** OKAY. BUT WITH RESPECT TO THE POINT OF  
5 UNIFORM FINANCIAL MISREPRESENTATIONS, WHICH IS A POINT THAT A  
6 NUMBER OF CASES -- AND WE CITED THOSE IN OUR BRIEF -- SAY THAT  
7 THERE'S A PRESUMPTION OF RELIANCE WHEN WE'RE TALKING ABOUT PRICE.  
8 AND THAT'S WHAT THIS CASE IS ABOUT: MISREPRESENTATIONS ON PRICE  
9 AT THE POINT OF SALE.

10 AND THAT IS --

11 **THE COURT:** BUT IT'S NOT. THAT IS THE  
12 MISREPRESENTATION IS NOT AT THE POINT OF SALE. THE ONLY ALLEGED  
13 MISREPRESENTATION THAT HOLDS YOUR THEORY TOGETHER IS A  
14 REPRESENTATION TO THE PBM'S AND THE TPP'S.

15 IN TERMS OF A PRESUMPTION OF RELIANCE, WHAT STATES OF THE 11  
16 FOLLOW THAT PRESUMPTION?

17 **MR. GILMORE:** YOUR HONOR, WELL, FIRST OF ALL THERE ARE  
18 A NUMBER OF STATES THAT DON'T HAVE RELIANCE AS UDAAP --

19 **THE COURT:** DO YOU HAVE THE LIST, YES OR NO?

20 **MR. GILMORE:** I DO. GIVE ME ONE MINUTE.

21 **THE COURT:** WHILE HE'S LOOKING, WHAT ABOUT THIS  
22 DISTINCTION BETWEEN DISCRETIONARY AND NECESSARY PURCHASES, MR.  
23 HEARD?

24 **MR. HEARD:** YOUR HONOR'S ANSWER WAS THE ANSWER WE GAVE  
25 IN OUR BRIEF, WHICH IS THE QUESTION ISN'T WHETHER THE DRUG

1       PRESCRIPTION IS INDISPENSABLE.  THE QUESTION IS WHETHER THEY HAVE  
2       AN ALTERNATIVE SOURCE.  AND THE PLAINTIFFS' OWN EVIDENCE IS THAT  
3       THEY REGULARLY SWITCH BETWEEN PHARMACIES PRECISELY BECAUSE THERE  
4       WERE PHARMACIES ESSENTIALLY ACROSS THE STREET.  AND EVEN WHERE  
5       THEY DIDN'T SWITCH, THEY TESTIFIED THAT THERE WERE PHARMACIES  
6       NEARBY.  BUT THAT QUESTION IS AN INDIVIDUAL QUESTION  
7       PLAINTIFF-BY-PLAINTIFF, JUST AS THE QUESTION OF CONTINUITY OF  
8       CARE IS PECULIAR TO EACH INDIVIDUAL AND WHETHER THAT WAS A  
9       CONCERN IN THEIR CASE.

10               **THE COURT:**  ALL RIGHT.  DO YOU HAVE THE ANSWER?

11               **MR. GILMORE:**  YES, YOUR HONOR.  FOR EXAMPLE, WITH  
12       RESPECT TO UDAAP, THE STATUTORY CLAIMS, ONLY ARIZONA, CALIFORNIA,  
13       PENNSYLVANIA AND TEXAS REQUIRE RELIANCE.  THE OTHER STATES DO NOT  
14       REQUIRE RELIANCE AS PART OF THEIR UDAAP CLAIMS.

15               YOUR HONOR, WITH RESPECT TO WHAT THE EVIDENCE SHOWS, CVS HAS  
16       NOT POINTED TO EVIDENCE THAT PLAINTIFFS HAD REASONABLY ECONOMIC  
17       ALTERNATIVES TO BUY THESE SAME DRUGS FOR LESS THAN WHAT THEY WERE  
18       BUYING THEM FROM CVS.  THEY ARE MEDICALLY NECESSARY DRUGS.  SO  
19       THE QUESTION ISN'T YOU DON'T NEED TO BUY THEM.  THE QUESTION IS:  
20       COULD YOU GO SOMEWHERE ELSE AND GET THEM FOR LESS THAN WHAT  
21       YOU'RE PAYING CVS FOR IT?

22               AND THAT'S NOT EVIDENCE THAT CVS HAS PUT IN THE RECORD, BUT  
23       WE DON'T THINK THAT THERE IS EVIDENCE OF THAT.  AND WITH RESPECT  
24       TO -- YOUR HONOR, I THINK THAT THE TESTIMONY ABOUT WHETHER THERE  
25       ARE OTHER PHARMACIES, I MEAN THAT IS TRUE, BUT INCONSEQUENTIAL,

1 BECAUSE IT'S NOT -- OF COURSE THERE ARE OTHER PHARMACIES OUT  
2 THERE, BUT THEY NEED TO GET THESE DRUGS. AND THEY DIDN'T HAVE A  
3 CHOICE.

4 **THE COURT:** I DON'T UNDERSTAND THAT STATEMENT. CVS HAS  
5 PENICILLIN AND WALGREENS DOESN'T?

6 **MR. GILMORE:** DOES WALGREENS OFFER IT? IS THERE A  
7 WALGREENS NEARBY SUCH THAT IT'S ECONOMICAL TO GO THERE AND BUY  
8 THE PRESCRIPTION FOR THE SAME OR LESS THAN WHAT YOU'RE PAYING  
9 CVS?

10 THAT'S -- PLAINTIFFS -- WHAT CVS HAS TRIED TO DO IS SAID  
11 THAT PLAINTIFFS HAD OTHER OPTIONS, BUT THEY ACTUALLY HAVEN'T PUT  
12 THAT EVIDENCE IN THAT YOU HAD OTHER OPTIONS TO BUY THESE SAME  
13 DRUGS SOMEWHERE LESS. THEY DIDN'T GO OUT AND GET MARKETING  
14 SURVEYS, FOR INSTANCE.

15 **MR. HEARD:** IT'S IN THE PLAINTIFFS' DEPOSITION  
16 TESTIMONY, AND I'M PREPARED TO HAND UP THE EXCERPTS FROM THAT  
17 TESTIMONY THAT SHOWS THAT.

18 **MR. GILMORE:** ON THE PRICES?

19 **THE COURT:** YOU DIDN'T TALK TO HIM DIRECTLY, DID YOU?

20 **MR. GILMORE:** YOUR HONOR, ON THE PRICES, I DON'T THINK  
21 THAT THERE ARE -- I DON'T THINK THAT THERE'S DEPOSITION TESTIMONY  
22 THAT SAYS THAT FOR THE PRESCRIPTIONS THAT THE PLAINTIFFS WERE  
23 PURCHASING HERE THAT THEY WERE ABLE TO OBTAIN THOSE PURCHASES FOR  
24 LESS FROM OTHER PHARMACIES.

25 **THE COURT:** ALL RIGHT. LET'S MOVE ON TO INJURIES,

1 THIRD ISSUE UNDER PREDOMINANCE.

2 SO WE HAVE TWO PARTICULAR PLAINTIFFS THAT YOU'RE CONCERNED  
3 ABOUT ON THE DEFENSE SIDE, MR. HEARD.

4 **MR. HEARD:** WELL, THOSE TWO ARE ILLUSTRATIVE. THE  
5 LARGER PROBLEM, YOUR HONOR, IS THAT TO DETERMINE WHETHER A CLASS  
6 MEMBER HAS INJURY ONE HAS TO LOOK BACK TO THEIR PARTICULAR HEALTH  
7 INSURANCE POLICY, THEIR PLAN.

8 THAT'S WHAT CONTRACTUALLY SAYS THAT THEY ARE GOING TO MAKE A  
9 \$5 COPAYMENT OR A \$20 COPAYMENT OR TIERED COPAYMENT.

10 **THE COURT:** WITH RESPECT TO KRONE -- AND THAT'S  
11 K-R-O-N-E -- WHAT'S YOUR RESPONSE ON THE COLLATERAL SOURCE  
12 ARGUMENT RAISED BY THE PLAINTIFFS IN THEIR REPLY?

13 **MR. HEARD:** I WOULD SAY THREE RESPONSES, YOUR HONOR.  
14 FIRST, THE COLLATERAL SOURCE RULE MIGHT APPLY. WHAT WE WERE  
15 TALKING ABOUT WAS INSURANCE THAT WAS INSURING AGAINST THE RISK OF  
16 BEING OVERCHARGED. THAT'S NOT THE KIND OF INSURANCE THAT IS  
17 INVOLVED HERE, AND I DON'T THINK LOGICALLY THE COLLATERAL SOURCE  
18 RULE APPLIES.

19 SECONDLY, AS A MATTER OF COMMON SENSE WHEN THE QUESTION IN  
20 THIS CASE IS WHETHER THE CUSTOMER PAID MORE THAN HE SHOULD HAVE,  
21 ACCORDING TO THE TERMS OF HIS INSURANCE POLICY, ONE HARDLY IGNORE  
22 WHAT THE INSURANCE POLICY PROVIDES AND PAID.

23 THIRD, THE LEGAL PRINCIPLE IS THAT THE COLLATERAL SOURCE  
24 RULE DOESN'T APPLY UNLESS THE PAYMENT IS FROM A WHOLLY  
25 INDEPENDENT THIRD PARTY. AND THE TPP'S, THE THIRD-PARTY PAYERS,

1 ARE NOT WHOLLY INDEPENDENT --

2 **THE COURT:** RESPONSE, MR. GILMORE, TO THOSE THREE  
3 POINTS?

4 **MR. GILMORE:** YOUR HONOR, THE COLLATERAL SOURCE RULE IN  
5 GENERAL IN CALIFORNIA AND OTHER JURISDICTIONS SAYS IF A  
6 THIRD-PARTY REIMBURSES A PLAINTIFF FOR SOME OF THE LOSS THAT  
7 DOESN'T EXONERATE THE DEFENDANT FOR THE LIABILITY.

8 TO BE CLEAR, AS I UNDERSTAND WHAT CVS IS TRYING TO ARGUE,  
9 CVS IS SAYING POSSIBLY IF WE HADN'T OVERCHARGED PEOPLE, THEN THEY  
10 MAY HAVE BEEN -- THEY MAY HAVE PAID THE SAME AMOUNT  
11 OUT-OF-POCKET.

12 AND THAT IS A CONJECTURAL ARGUMENT. AND THE CASE LAW IS  
13 CLEAR YOU CAN'T OPPOSE CLASS CERTIFICATION WITH A CONJECTURAL  
14 ARGUMENT.

15 MORE IMPORTANTLY, CVS IS CONFUSING WHAT IS RELEVANT ABOUT  
16 THE INSURANCE HERE. YOU DON'T NEED TO LOOK AT THE SPECIFIC PLAN  
17 DESIGN THAT A PLAINTIFF HAS. WHAT YOU NEED TO LOOK AT IS THE  
18 REQUIREMENT FOR LOWER AND USUAL AND CUSTOMARY PRICING.

19 AND INSURER CALCULATES WHAT THE DEFAULT COPAYMENT IS. AND  
20 HOWEVER IT DOES THAT IT THEN COMPARES THAT NUMBER TO WHAT IT GOT  
21 AS THE USUAL AND CUSTOMARY PRICES REPORTED FROM THE PHARMACY.  
22 AND IF THE USUAL AND CUSTOMARY PHARMACY PRICE IS LOWER, THAT'S  
23 THE NUMBER THAT THE INSURER, THE PBM, TELLS THE PHARMACY TO  
24 COLLECT.

25 SO THE VARIATIONS IN PLAN DESIGN DON'T MATTER. YOU GET TO A

1 COMPARISON THAT IS UNIFORM ACROSS THE CLASS.

2 **THE COURT:** HOW ARE YOU GOING TO -- LET'S SAY KRONE,  
3 HOW DO YOU CALCULATE THE DAMAGES FOR KRONE WITHOUT LOOKING AT HER  
4 INSURANCE?

5 **MR. GILMORE:** WHAT CVS -- AS I UNDERSTAND IT, CVS IS  
6 ARGUING THAT --

7 **THE COURT:** I'M ASKING YOU, MR. GILMORE, AS THE  
8 PLAINTIFFS' ATTORNEY HOW DO YOU CALCULATE THE DAMAGES FOR  
9 PLAINTIFF KRONE WITHOUT LOOKING AT HER POLICY?

10 **MR. GILMORE:** WE CALCULATE THE DAMAGES AS FOLLOWS: WE  
11 HAVE CVS'S TRANSACTION DATA. WE KNOW AT THE TIME FOR HER  
12 PURCHASES FROM CVS -- BY THE WAY, SHE'S A FORMER PLAINTIFF.  
13 SHE'S BEEN DISMISSED FOR REASONS NOT RELEVANT TO THIS ISSUE. BUT  
14 IT'S ILLUSTRATIVE.

15 WE LOOK AT CVS'S TRANSACTION DATA. THE INFORMATION IS ALL  
16 IN THE TRANSACTION DATA. WE KNOW THAT THE NUMBER THAT THE -- HER  
17 INSURER OR PBM REPORTED TO CVS. WE COMPARE THAT TO WHAT  
18 PROFESSOR HAYES RECALCULATED AS WHAT CVS'S TRUE, USUAL AND  
19 CUSTOMARY PRICE OUGHT TO HAVE BEEN.

20 AND IF THE TRUE, USUAL AND CUSTOMARY PRICE IS LESS THAN WHAT  
21 SHE PAID AS A COPAYMENT, THEN THE DELTA IS THE DAMAGES.

22 YOU DON'T NEED TO LOOK AT THE VARIATIONS, TO THE EXTENT  
23 THERE ARE ANY VARIATIONS, IN HER OWN PLAN DESIGN BECAUSE THAT  
24 LOWER U & C PRICING IS UNIFORM.

25 **THE COURT:** IF I HAVE AN INSURANCE PLAN THAT TELLS ME I

1 HAVE TO PAY \$10 PER PRESCRIPTION, AND I WANT TO BUY OR I NEED TO  
2 BUY AMOXICILLIN FOR MY KID, AND IT WAS REPORTED AS THE -- THE  
3 BOTTLE WAS REPORTED AS BEING \$30. UNDER MY PLAN I PAY TEN. IF  
4 THE USUAL AND CUSTOMARY PRICE WAS \$20, UNDER MY PLAN I PAID TEN.  
5 I DON'T GET TO PAY ZERO, WHICH IS THE DELTA, THE \$10 DELTA  
6 BETWEEN THE TWO PRICES.

7 SO HOW DO YOU DECIDE WHAT MY DAMAGES ARE IF THE TWO NUMBERS  
8 ARE STILL HIGHER THAN THE MINIMUM AMOUNT I HAVE TO PAY UNDER MY  
9 PLAN?

10 **MR. GILMORE:** IN THAT CASE THERE ARE NO DAMAGES.  
11 HERE'S WHERE THERE WOULD BE DAMAGES. SAY THE PHARMACIES -- SAY  
12 YOUR COPAYMENT IS \$10, BUT IT'S SUBJECT TO THIS LOWER U & C  
13 PRICING. AND IF YOU HAVE EVER GONE TO THE PHARMACY AND NORMALLY  
14 YOU PAY YOUR FLAT RATE, BUT SOMEDAY FOR THE SAME PRESCRIPTION  
15 INSTEAD OF PAYING THE NORMAL RATE YOU'RE ACCUSTOMED TO, IT'S SOME  
16 DIFFERENT, SMALLER NUMBER. THAT IS VERY LIKELY A SITUATION WHERE  
17 THE PHARMACY SUBMITTED ITS USUAL AND CUSTOMARY PRICE. THAT  
18 NUMBER, THE U & C, IS LOWER THAN YOUR DEFAULT COPAY, AND SO YOUR  
19 INSURER TOLD THE PHARMACY:

20 "CHARGE JUDGE GONZALEZ ROGERS THIS SMALLER AMOUNT."

21 WHAT WE'RE SEEING IN OUR CASE IS THAT CVS SHOULD HAVE BEEN  
22 SUBMITTING LOWER USUAL AND CUSTOMARY PRICES INSTEAD OF THE  
23 INFLATED ONE. SO WE --

24 **THE COURT:** SO BACK TO MY ORIGINAL QUESTION --

25 **MR. GILMORE:** SURE.

1           **THE COURT:** -- WHICH IS: HOW DO YOU MAKE THAT  
2 CALCULATION WITHOUT AN ANALYSIS OF THE PLAN?

3           **MR. GILMORE:** BECAUSE WE KNOW --

4           **THE COURT:** YOU HAVE TO KNOW WHAT THE BASE NUMBER IS.

5           **MR. GILMORE:** WE KNOW WHAT THE BASE NUMBER IS. WE KNOW  
6 THE NUMBER THAT THE INSURER TOLD THE PHARMACY TO COLLECT. AND WE  
7 LOOK AT THAT AND WE COMPARE IT TO THE RECALCULATED U & C'S THAT  
8 PROFESSOR HAYES DEVELOPED BASED ON THE CVS HSP PRICES. AND IF  
9 THAT RECALCULATED U & C IS LOWER THAN WHAT THE PERSON ACTUALLY  
10 PAID AT THE STORE, THAT DIFFERENCE ARE THE DAMAGES. IT'S THE  
11 SAME CALCULATION CLASS-WIDE, AND IT'S UNIFORM.

12           **THE COURT:** YOU'RE DOING THIS DRUG BY DRUG?

13           **MR. GILMORE:** IT'S NOT DRUG BY DRUG, BECAUSE ALL OF THE  
14 DRUGS IN THE CLASS WERE PRICED WITH THE SAME PRICES THAT WERE --  
15 THAT WERE BEING OFFERED THROUGH THE HSP PRICES.

16           **THE COURT:** HOW MANY CLASSES OF DRUGS ARE THERE?

17           **MR. GILMORE:** I DON'T THINK THERE ARE REALLY ANY  
18 CLASSES. ALL OF THE DRUGS THAT ARE IN THE CASE ARE DRUGS THAT  
19 WAS OFFERED THROUGH THE HSP PROGRAM.

20           **THE COURT:** YOU USED THE WORD "CLASS," SO I USED YOUR  
21 WORD. IF IT'S NOT A CLASS, THEN WHAT IS IT?

22           **MR. GILMORE:** IT'S THE -- WELL, I'M SORRY. I'M  
23 MISUNDERSTOOD YOU'RE QUESTION.

24           **THE COURT:** SO LET'S GO BACK THEN.

25           **MR. GILMORE:** THE CLASS IS THE DRUGS THAT CVS OFFERED

1 THROUGH THE HSP PROGRAM.

2 **THE COURT:** HOW MANY ARE THERE?

3 **MR. GILMORE:** IT'S APPROXIMATELY 400. WE KNOW THE  
4 EXACT NUMBER. AND, IN FACT, WE HAVE A COMPLETE SET FOR THE 11  
5 STATES AT ISSUE OF ALL THE TRANSACTIONS OF ANY KIND THAT INVOLVED  
6 THOSE DRUGS THAT ARE OFFERED THROUGH THE HSP PROGRAM.

7 **THE COURT:** BACK TO MY ORIGINAL QUESTION: ARE YOU  
8 DOING YOUR ANALYSIS DRUG BY DRUG, I.E. THE 400 SPECIFIC DRUGS AT  
9 ISSUE?

10 **MR. GILMORE:** BY AND LARGE, NO, FOR THE OVERWHELMING  
11 NUMBER OF DRUGS. FOR THE OVERWHELMING NUMBER OF DRUGS THEY WERE  
12 ALL BEING OFFERED FOR THE SAME PRICE THROUGH THE HSP PROGRAM.  
13 AND SO THE CALCULATION TAKES THAT SAME PRICE POINT AND SIMPLY  
14 RECALCULATES THE HSP -- I'M SORRY -- RECALCULATES THE USUAL AND  
15 CUSTOMARY PRICE USING THAT UNIFORM PROGRAM PRICE POINT. AND THEN  
16 IT COMPARES IT TO --

17 **THE COURT:** WAIT ONE MOMENT.

18 **MR. GILMORE:** -- AND IF THERE'S A DIFFERENCE --

19 **THE COURT:** USUALLY YOU STOP WHEN I START TALKING.

20 AT WHAT POINT IN TIME? WHEN HAVE YOU TAKEN THE SNAPSHOT TO  
21 DO THE COMPARATIVE ANALYSIS?

22 **MR. GILMORE:** WELL, WE DO IT FOR EACH TRANSACTION IN  
23 THE DATA. CVS HAD PRICING AT ONE PRICE POINT IN THE HSP PROGRAM  
24 FROM 2008 UP TO 2010, AND THEN BEGINNING IN 2011 IT WENT UP TO A  
25 DIFFERENT PRICE POINT. SO WE HAVE THOSE TWO SORT OF SETS OF

1 PRICES UNDER THE PROGRAM.

2 THAT'S WHAT PROFESSOR HAYES IS USING.

3 MY APOLOGIES, YOUR HONOR. I DIDN'T REALIZE THAT YOU WERE  
4 TALKING. I DIDN'T MEAN TO INTERRUPT.

5 **THE COURT:** NO, I INTERRUPTED YOU.

6 **MR. GILMORE:** YOU'RE ALLOWED TO DO THAT.

7 **THE COURT:** ANY RESPONSE?

8 **MR. HEARD:** YOUR HONOR, ONLY IF YOU GO BACK TO THE  
9 INDIVIDUAL PLAINTIFFS' INSURANCE POLICY WILL YOU KNOW, FOR  
10 EXAMPLE, THAT THEY HAD A \$5 COPAY. AND IF THEY HAD A \$5 COPAY  
11 THEY NEVER PAID MORE THAN THE HSP MEMBER PRICE. AND SUCH  
12 PLAINTIFFS WOULD HAVE NO LOSS, NO INJURY. THAT'S WHY --

13 **THE COURT:** YOU CAN TELL THAT RIGHT NOW BECAUSE YOU --  
14 I MEAN, THESE ARE JUST NUMBERS, RIGHT? AND IF THE DATA SET IS  
15 BIG ENOUGH AND THE ALGORITHM IS SOPHISTICATED ENOUGH, CAN'T THAT  
16 BE CALCULATED?

17 **MR. HEARD:** YOU CAN CALCULATE THE DELTA, I SUPPOSE,  
18 BETWEEN THE U & C PRICE AND WHAT THEY PAID. WHAT YOU CAN'T TELL  
19 IS WHAT THEY WERE -- WHAT THEIR INSURANCE POLICY GUARANTEED THEM  
20 AS A PRICE. WHAT DID THEY CONTRACT TO GET? AND SOME WILL HAVE  
21 CONTRACTED TO PAY COPAYMENT THAT MEANT THEY COULD NEVER POSSIBLY  
22 HAVE LOST MONEY AS A RESULT OF THE --

23 **THE COURT:** ISN'T THAT JUST 1200 NUMBERS? THAT IS, YOU  
24 HAVE 1200 CONTRACTS THAT SAY IF -- LET'S SAY 500 OF THEM SAY  
25 500 -- I MEAN, \$5 FOR PRESCRIPTION, WELL, ISN'T THAT EASY ENOUGH

1 TO TAKE OUT THOSE, ANYBODY WHO HAS THOSE \$5 CONTRACTS?

2 **MR. HEARD:** NO, YOUR HONOR. IT'S REALLY MORE THAN 1200  
3 CONTRACTS. THAT'S THE NUMBER OF CVS PBM CONTRACTS ACCORDING TO  
4 THE PLAINTIFFS. WHEN WE TALK ABOUT THE NUMBER OF DIFFERENT  
5 HEALTH INSURANCE POLICIES THAT THE 38 MILLION MEMBERS OF THE  
6 CLASS HAD WE'RE TALKING ABOUT MANY MULTIPLES OF 1,000 CONTRACTS.  
7 AND IT'S THOSE PLANS THAT TELL US WHAT THEY HAD CONTRACTED TO PAY  
8 FOR THEIR DRUGS.

9 **THE COURT:** BUT DON'T THE 38 MILLION FUNNEL INTO THE  
10 1200?

11 **MR. HEARD:** THEY FUNNEL INTO 50 PBM'S WHO ADMINISTER  
12 THEIR TRANSACTIONS, SOME NUMBER OF ADDITIONAL CONTRACTS, BUT THAT  
13 DOESN'T -- THAT TELLS US WHAT THE DIFFERENCE WAS BETWEEN WHAT  
14 THEY PAID AND USUAL AND CUSTOMARY PRICE. IT DOESN'T TELL US WHAT  
15 THEIR HEALTH INSURANCE POLICY GUARANTEED THEM.

16 HOW WOULD YOU KNOW THAT THEY HAD A \$5 COPAYMENT UNLESS YOU  
17 WENT BACK TO THEIR POLICY TO KNOW THAT?

18 **THE COURT:** RIGHT. WE NEED TO KEEP MOVING. SO MOVING  
19 ON TO TYPICALITY.

20 **MR. GILMORE:** MAY I VERY QUICKLY JUST DRAW THE COURT'S  
21 ATTENTION TO ONE EXHIBIT THAT BEARS ON THIS POINT? IT'S ECF  
22 17034. IT'S EXHIBIT 26 IN OUR MOTION.

23 CVS IS TRYING TO SAY THAT IT'S IMPOSSIBLE TO CALCULATE THE  
24 DAMAGES IF YOU PLUG IN THE HSP PRICES AS USUAL AND CUSTOMARY  
25 PRICES. BUT AT THE TIME CVS DID EXACTLY THAT. CVS WAS

1 CONCERNED --

2 **THE COURT:** ALL RIGHT.

3 YOU MADE YOUR POINT. I'LL GO LOOK AT THE EXHIBIT.

4 **MR. GILMORE:** I HAVE A COPY HERE, IF YOU LIKE, YOUR  
5 HONOR.

6 **THE COURT:** I HAVE IT.

7 AM I RIGHT THAT IF I STRIKE DR. HAYES' DECLARATION YOU HAVE  
8 NO EVIDENCE INDICATING THAT CAINE WOULD BE TYPICAL OF THE CLASS?

9 **MR. GILMORE:** WELL, SHE TESTIFIED IN HER DEPOSITION,  
10 YOUR HONOR, AND OUR INTERROGATORY RESPONSES IDENTIFY WHAT WE  
11 BELIEVE IS THE KIND OF TRANSACTION THAT FITS THE CLASS  
12 DEFINITION.

13 **THE COURT:** ALL RIGHT. NEXT, THE PRORATION ISSUE.  
14 HERE IT LOOKS LIKE BROWN, HAGERT, ODORISIO AND WULFF WERE THE  
15 ONES WHO DID NOT MAKE THE 90-DAY SUPPLIES? THEY WERE THE ONES  
16 WHO ONLY DID 30 OR 60, SO THEY WOULD NOT BE TYPICAL IF I DID NOT  
17 FIND FOR YOU ON THAT ISSUE?

18 **MR. GILMORE:** THAT WOULD BE CORRECT, YOUR HONOR.

19 **THE COURT:** ALL RIGHT. WITH RESPECT TO THE ARGUMENT  
20 ABOUT VOLUNTARY PAYMENT, AGAIN, COULDN'T THAT ISSUE BE RESOLVED  
21 SIMPLY IN HOW EITHER A CLASS IS DEFINED OR IN HOW A CLASS IS  
22 ADMINISTERED?

23 **MR. HEARD:** THE REASON I THINK NOT, YOUR HONOR, AND  
24 HAVING GIVEN THIS SOME REFLECTION SINCE YOU ASKED THAT, THE  
25 RELIANCE ARGUMENT AND VOLUNTARY PAYMENT IS SOMEWAY JUST THE FLIP

1 SIDE OF THAT COIN, IS A STATE OF MIND QUESTION. DOES THE  
2 PLAINTIFFS' SUBSEQUENT CONDUCT REFLECT THAT THEY WOULD HAVE  
3 ENGAGED IN THIS TRANSACTION?

4 **THE COURT:** BUT IF THE CLASS PERIOD ENDED WHEN THE --  
5 THAT'S WHY I ASKED ABOUT DEFINITION. IF THE CLASS PERIOD ENDED  
6 WHEN THE SUIT WAS FILED JULY 30, 2015, WOULDN'T THAT ADDRESS THE  
7 ISSUE?

8 **MR. HEARD:** OKAY. WELL, WE'RE USING THE VOLUNTARY  
9 PAYMENT DOCTRINE IN THE FOLLOWING WAY. CLEARLY, THE PLAINTIFFS  
10 ENGAGED IN A SERIES OF TRANSACTIONS, CONTINUED PATRONAGE, AFTER  
11 THEY FILED THE LAWSUIT. THAT CONDUCT REFLECTS THAT THE PRICE  
12 WASN'T TERRIBLY IMPORTANT TO THEM AND REFLECTS BACK ON WHAT THEIR  
13 STATE OF MIND WAS.

14 **THE COURT:** WELL, IT COULD ALSO REFLECT THAT THEY  
15 DIDN'T KNOW.

16 **MR. HEARD:** IT COULD, BUT THAT'S AN INDIVIDUAL ISSUE.

17 **THE COURT:** ALL RIGHT.

18 **MR. HEARD:** IT'S AN INDIVIDUAL ISSUE, YOUR HONOR. THE  
19 PLAINTIFFS STOPPED THEIR PATRONAGE. THERE'S A COINCIDENCE HERE  
20 WHICH AGAIN SHOWS THE INDIVIDUALITY OF THE EVIDENCE. THE  
21 PLAINTIFFS ONLY STOPPED THEIR CONTINUED PATRONAGE WHEN YOUR HONOR  
22 RULES ON THE MOTION TO DISMISS AND SAYS MATERIALITY MAY BE  
23 AFFECTED BY THEIR --

24 **THE COURT:** WITH RESPECT TO THE TEXAS REPRESENTATIVES,  
25 HOW ARE YOU DEALING WITH THE DIFFERENCE BETWEEN THEIR DEPOSITION

1 TESTIMONY AND THE REVISIONS TO THE COMPLAINT AFTER I MADE MY  
2 RULING?

3 **MR. GILMORE:** YOUR HONOR, WHEN THE TEXAS PLAINTIFFS  
4 JOINED THE LAWSUIT IN MARCH OF 2016, CVS HAD STOPPED THE HSP  
5 PROGRAM A MONTH EARLIER, SO THERE WASN'T AVAILABLE THROUGH CVS  
6 THESE HSP-ELIGIBLE DRUGS BEING OFFERED AT THE HSP PRICES. SO THE  
7 FACT THAT THEY MADE OTHER PURCHASES AT CVS ISN'T THE RELEVANT  
8 ISSUE.

9 THE RELEVANT ISSUE IS: ARE THERE OTHERWISE QUALIFYING  
10 TRANSACTIONS THAT OCCURRED AFTER A PERSON JOINED THE SUIT? WE  
11 DON'T THINK THAT THEY -- WE KNOW THEY DON'T HAVE QUALIFYING  
12 TRANSACTIONS FROM THE POINT IN TIME WHICH THEY JOINED THE SUIT.

13 THEIR TRANSACTIONS THAT QUALIFY FOR THE CLASS WERE YEARS  
14 FORWARD.

15 **THE COURT:** ACTUALLY, I DON'T WANT TO HEAR MUCH ON  
16 ERISA OR ADEQUACY, BUT I'LL GIVE YOU A MINUTE EACH IF YOU WANT TO  
17 SUPPLEMENT ANYTHING FROM YOUR BRIEF.

18 **MR. GILMORE:** WE STAND ON OUR PAPERS ON THOSE TWO  
19 POINTS, YOUR HONOR.

20 **THE COURT:** MR. HEARD?

21 **MR. HEARD:** YOUR HONOR, AS TO ERISA, THE ONE THING I  
22 WOULD ADD IS THAT THE PLAINTIFFS IN THEIR REPLY RELIED ON THE  
23 DISTRICT COUNSEL CASE. WE THINK THE MORE APT AUTHORITY IS THE  
24 NINTH CIRCUIT DECISION IN THE OREGON TEAMSTER EMPLOYERS TRUST,  
25 DECIDED FIVE MONTHS LATER, 800 F.3D 1151.

1           ON THE QUESTION OF ADEQUACY, WE CERTAINLY APPRECIATE THAT  
2           IT'S A HARD STANDARD TO MEET OFTENTIMES, BUT THE PLAINTIFF SHOULD  
3           AT LEAST KNOW THE BASICS ABOUT THEIR CLAIM. WE'VE STATED IN THE  
4           PAPERS AND PROVIDED EXHIBIT FIVE TO SHOW HOW STRIKINGLY  
5           UNFAMILIAR THEY WERE WITH EVEN THE TERMINOLOGY, MUCH LESS WHAT IT  
6           MEANT.

7           BUT BEYOND THAT, YOUR HONOR, I THINK WHAT IS STRIKING -- AND  
8           I WOULD DRAW YOUR ATTENTION TO THIS -- IS BEYOND THEIR  
9           UNFAMILIARITY WITH THE HEALTH SAVINGS CLASS PROGRAM, OR EVEN THE  
10          TERM "USUAL AND CUSTOMARY PRICING" --

11                 **THE COURT:** YOU KNOW WHAT? SOMEONE ONCE ARGUED THAT I  
12           SHOULD DISMISS A JUROR IN A CRIMINAL CASE BECAUSE THE JUROR  
13           DIDN'T UNDERSTAND THE WORD "ABIDE." I DO NOT HOLD IT AGAINST  
14           PEOPLE WHO ARE NOT AS SMART AS YOU THAT THEY DON'T UNDERSTAND  
15           WHAT A "USUAL AND CUSTOMARY PRICE" IS, OR THAT THEY DON'T  
16           UNDERSTAND THE ACRONYM "HSP" OR THAT THEY DON'T UNDERSTAND THE  
17           SOPHISTICATIONS OF SOME PROGRAM.

18                 **MR. HEARD:** NOR DO WE EXPECT YOU TO, YOUR HONOR.

19                 **THE COURT:** I JUST DON'T.

20                 **MR. HEARD:** THAT'S REALLY NOT OUR ARGUMENT. I THINK  
21           THEIR KNOWLEDGE IS MORE FUNDAMENTALLY --

22                 **THE COURT:** ALL RIGHT. ENOUGH ON THAT ONE. LET'S MOVE  
23           ON.

24           SUPERIORITY. SUPERIORITY.

25                 **MR. GILMORE:** YOUR HONOR, MY COLLEAGUE, BONNY SWEENEY,

1 WILL BE PREPARED TO ADDRESS THAT IF YOUR HONOR'S QUESTIONS ARE  
2 ABOUT THE ELEMENTS OF THE CLAIMS AND THE APPROACH TO TRYING THIS  
3 CASE AS A CLASS ACTION.

4 IF YOUR HONOR HAS QUESTIONS ON THOSE AREAS, MS. SWEENEY WILL  
5 BE PREPARED TO ADDRESS THEM. IF THERE ARE OTHER ELEMENTS OR  
6 OTHER ASPECTS I MAY BE THE ONE TO ANSWER THOSE QUESTIONS.

7 **THE COURT:** THAT'S FINE. I ACTUALLY DON'T -- I MEAN,  
8 FRANKLY, I DON'T HAVE TOO MANY QUESTIONS ON THIS. WE'LL GET TO  
9 THIS IF WE CAN. LET'S DEAL WITH THE OTHER ELEMENTS FIRST.

10 BUT I WOULD LIKE FOR SOMEONE TO EXPLAIN TO ME BETTER HOW THE  
11 CONDOR SYSTEM WORKS GIVEN THE PLAINTIFFS' RELIANCE ON THAT FOR  
12 PURPOSES OF THEIR PROOF. SO CAN SOMEONE EXPLAIN TO ME HOW IT  
13 WORKS?

14 **MR. GILMORE:** YOUR HONOR, I THINK THE CONDOR CODE, IT'S  
15 JUST A NUMBER THAT GETS ASSIGNED TO PLANS. IT'S ALSO CALLED A  
16 "PLAN I.D." I THINK WITHIN CVS'S DOCUMENTS. SO I THINK THIS  
17 ISSUE GETS TO POTENTIALLY ASCERTAINABILITY. PROFESSOR HAYES, AS  
18 WE EXPLAIN IN OUR BRIEFS AND IN HIS DECLARATIONS, WENT THROUGH  
19 AND USING AN APPROACH THAT, FRANKLY, CVS'S 30 (B) (6) DEPONENT  
20 WITNESS SAID WAS THE APPROPRIATE ONE, AND IS REALLY CONSISTENT  
21 EVEN WITH THE DECLARANT'S DECLARATION.

22 **THE COURT:** WOULD YOU EXPLAIN IT?

23 **MR. GILMORE:** SURE. IT'S A PLAN I.D. NUMBER. SO YOU  
24 ASSOCIATE THE NUMBER WITH THE CONTRACTS THAT CVS HAS.

25 **THE COURT:** LET ME ASK IT DIFFERENTLY.

---

1                   **MR. GILMORE:**   RIGHT.

2                   **THE COURT:**   CAN YOU EXPLAIN HOW YOUR EXPERT IS GOING TO  
3                   USE IT IN HIS CALCULATIONS?

4                   **MR. GILMORE:**   OF COURSE.   HE LINKS TRANSACTIONS THAT  
5                   HAVE CONDOR CODES AND DESCRIPTIONS OF THE PLAN.   MAYBE IF I JUST  
6                   CALL IT "PLAN I.D. NUMBER."

7                   CVS'S TRANSACTION DATA HAS THE PLAN I.D. NUMBER AND A PLAN  
8                   NAME FOR EACH TRANSACTION.   AND IT'S FIELDS IN CVS TRANSACTION  
9                   DATA.   HE USES THAT INFORMATION ALONG WITH THE INFORMATION CVS  
10                  HAS PRODUCED IN DISCOVERY OF WHAT THOSE PLAN NUMBERS CORRESPOND  
11                  TO IN TERMS OF THE CONTRACTS.   AND THEN, IF THE TRANSACTION,  
12                  ACCORDING TO THE PLAN I.D. NUMBER, MATCHES UP WITH A CONTRACT  
13                  THAT IS PART OF OUR CLASS DEFINITION, THEN IT'S A QUALIFYING  
14                  TRANSACTION, ASSUMING IT HAS THE OTHER ELEMENTS THAT THERE'S  
15                  DAMAGES.

16                  SO IT'S SIMPLY A NUMBER THAT IS USED TO LINK A TRANSACTION  
17                  TO CONTRACTS.

18                  **THE COURT:**   HOW MANY TRANSACTIONS ARE WE DEALING WITH?

19                  **MR. GILMORE:**   THERE ARE 30 -- THERE ARE APPROXIMATELY  
20                  40 MILLION CLASS MEMBERS.   I THINK IT'S IN OUR PAPERS.   THE  
21                  SPECIFIC TRANSACTION NUMBERS ARE HIGHER THAN THAT.

22                  **THE COURT:**   HOW MANY TRANSACTIONS DO YOU ESTIMATE EACH  
23                  MEMBER OF THE CLASS HAS?

24                  **MR. GILMORE:**   I DON'T KNOW THE ANSWER.   I MEAN, MOST OF  
25                  OUR PLAINTIFFS HAVE MULTIPLE QUALIFYING TRANSACTIONS.   I THINK

1 MAYBE ALL OF THEM DO.

2 **THE COURT:** DOES ANYBODY KNOW WHAT THE DATASET IS THAT  
3 WE'RE DEALING WITH? ANYBODY? AN ASSOCIATE?

4 **MR. HEARD:** IT'S OVER 200 MILLION TRANSACTIONS.

5 **THE COURT:** SO THESE 200 MILLION TRANSACTIONS HAVE, I  
6 TAKE IT, CRITICAL FIELDS. AND IT IS THE FIELDS THAT ARE -- THAT  
7 POPULATE THIS CONDOR PROGRAM?

8 **MR. GILMORE:** THE FIELDS HAVE A CONDOR CODE IS ONE OF  
9 THE FIELDS. AND THERE'S ALSO A PLAN DESCRIPTION. AND THOSE,  
10 THAT INFORMATION, IS USED TO LINK UP WITH CONTRACTS THAT HAVE  
11 THAT BLANK I.D. NUMBER AND THAT CONDOR CODE NUMBER. AND SO YOU  
12 CAN LINK THE TRANSACTIONS TO THE CONTRACTS.

13 **THE COURT:** MR. GEYERMAN.

14 I CAN'T HEAR YOU.

15 **MR. GEYERMAN:** MR. GEYERMAN, YOUR HONOR.

16 CONDOR CODE IS SET UP AT THE TIME THAT A PLAN IS SET UP IN  
17 CVS'S SYSTEM. THAT NUMBER MAY OR MAY NOT BE ASSOCIATED WITH A  
18 CONTRACT BETWEEN CVS AND A PBM. AND IT IS THE CONTRACT BETWEEN  
19 CVS AND THE PBM THAT CONTAINS THE RELEVANT DEFINITION OF "USUAL  
20 AND CUSTOMARY PRICE" FOR PURPOSES OF IDENTIFYING WHETHER IT'S IN  
21 OR OUTSIDE OF THE CLASS --

22 **THE COURT:** WHAT DOES THE CONDOR CODE NUMBER REPRESENT?

23 **MR. GEYERMAN:** IT REPRESENTS A PLAN THAT IN REAL TIME  
24 IS WHO CVS WILL BE ASSOCIATING THE CLAIM WITH. BUT THE CONDOR  
25 PLAN I.D. -- THE CONDOR CODE, SAME THING, SAME -- CONDOR NUMBER,

1 CONDOR CODE, MAY OR MAY NOT IDENTIFY THE RELEVANT CONTRACT WITH  
2 WHOM CVS IS CONTRACTING FOR THE CLAIM.

3 FOR EXAMPLE, FOR A PERIOD OF TIME CVS AND AETNA, ONE OF THE  
4 LARGEST HEALTH INSURERS IN THE COUNTRY, HAD A DIRECT CONTRACT  
5 BETWEEN THEMSELVES. THE CONDOR I.D. WAS ASSOCIATED WITH AETNA.  
6 FOR THE PERIOD OF TIME WHEN CVS CONTRACTED DIRECTLY WITH AETNA  
7 THAT'S THE CONTRACT YOU WOULD LOOK AT TO SEE WHAT THE RELEVANT  
8 DEFINITION OF "USUAL AND CUSTOMARY PRICE" IS.

9 AT SOME POINT DURING THE PUTATIVE CLASS PERIOD CVS AND  
10 AETNA, THE CONTRACT ENDED AND AETNA STARTED USING CAREMARK, A  
11 PBM. THE CONDOR CODE REMAINS THE SAME BECAUSE IT WAS STILL  
12 ASSOCIATED WITH AETNA PLANS AND HEALTH MEMBERS.

13 BUT ONCE CAREMARK BECAME THE INTERMEDIARY THE CONTRACT THAT  
14 CONTROLLED THE RELEVANT DEFINITION OF "USUAL AND CUSTOMARY PRICE"  
15 EXISTED BETWEEN CVS AND CAREMARK. AND SO, THEREFORE, THE  
16 RELEVANT CONTRACT CHANGES FOR A GIVEN CONDOR CODE OR CAN CHANGE  
17 FOR A GIVEN CONDOR CODE BASED UPON THE PARTICULAR BUSINESS  
18 RELATIONSHIP THAT CVS HAS WITH THE INSURER OR THE HEALTH PLAN.

19 AND THAT WAS THE BASIS OF OUR ARGUMENT ON THE CONDOR CLAIMS,  
20 THE MANAGEABILITY AND ASCERTAINABILITY.

21 **THE COURT:** ALL RIGHT.

22 **MR. GILMORE:** AND IF I MAY RESPOND.

23 **THE COURT:** NO. I'M JUST TRYING TO UNDERSTAND THE  
24 BASICS.

25 **MR. GILMORE:** SURE.

1                   **THE COURT:** OKAY. INJUNCTIVE RELIEF. I DON'T SEE HOW  
2 I CAN GRANT INJUNCTIVE RELIEF WHEN THERE'S NO CONDUCT TO ENJOIN  
3 AT THIS POINT.

4                   **MR. GILMORE:** YOUR HONOR, WE KNOW THAT CVS TRANSITIONED  
5 EN MASSE ITS HSP MEMBERS TO A NEW PROGRAM THAT IS BEING  
6 ADMINISTERED BY A THIRD PARTY. IT DOESN'T EVEN REQUIRE A FEE.  
7 AND WE ALSO KNOW THAT CVS IS NOT REPORTING THOSE PRICES AS ITS  
8 USUAL AND CUSTOMARY PRICES, EITHER.

9                   **THE COURT:** IS THAT PART OF THIS LAWSUIT AND ARE THOSE  
10 PEOPLE OR COMPANIES PART OF THIS LAWSUIT?

11                   **MR. GILMORE:** THE THIRD PARTY THAT IS ADMINISTERING IS  
12 NOT JOINED.

13                   **THE COURT:** HOW CAN I ENJOIN CONDUCT THAT IS NOT IN  
14 FRONT OF ME?

15                   **MR. GILMORE:** HE WOULD SAY, YOUR HONOR, THAT THERE'S A  
16 PROSPECT THAT CVS WILL CONTINUE EITHER REINSTITUTING AN HSP  
17 PROGRAM OR --

18                   **THE COURT:** STANDARD IS VERY, VERY HIGH. I MEAN, BASED  
19 UPON WHAT I HAVE, I DON'T THINK THERE'S ENOUGH THERE. WE'RE  
20 GOING TO KEEP MOVING. I HAVE PEOPLE WAITING IN THE GALLEY HERE.

21                   ON THIS DISCOVERY MOTION, WELL, I LOOK AT IT AS A DISCOVERY  
22 MOTION. IT'S A MOTION TO STRIKE.

23                   **MR. GILMORE:** TO STRIKE PROFESSOR HAYES' OPINIONS WITH  
24 RESPECT TO CERTAIN PLAINTIFFS?

25                   **THE COURT:** YES.

1                   **MR. GILMORE:** YES.

2                   **MR. GEYERMAN:** UM-HUM.

3                   **THE COURT:** THIS ALL MAY BE MOOT IF I DON'T GRANT THE  
4 MOTION TO CERTIFY. AND IF I DON'T GRANT THE MOTION TO CERTIFY,  
5 THEN YOU NOW HAVE THE INFORMATION. THEY CAN USE ALL OF THAT YOU  
6 ARE ON NOTICE. SO IF THEY FILE ANOTHER MOTION YOU HAVE ALL THAT.  
7 RIGHT?

8                   **MR. GEYERMAN:** WE DO HAVE THE INFORMATION NOW, YOUR  
9 HONOR. I FEEL THE PREJUDICE THAT WE SUFFERED, WE BELIEVE, IS  
10 THAT WE DEPOSED EACH OF THE NAMED PLAINTIFFS BEFORE WE GOT THE  
11 LARGER POOL OF --

12                   **THE COURT:** I TALKED TO JUDGE CORLEY ABOUT ALL OF YOU.  
13 AND SHE SAID THAT THE CONDUCT ON BOTH SIDES OF THE AISLE HAS BEEN  
14 LESS THAN IDEAL. SO SHE SAYS THAT, YOU KNOW, BOTH SIDES HAVE  
15 ACTED IN WAYS THAT ARE NOT -- THAT DO NOT COMPORT CERTAINLY WITH  
16 THE NORTHERN DISTRICT STANDARDS, IN TERMS OF THE KINDS OF MOTION  
17 PRACTICE SHE'S SEEN.

18                   SO I CERTAINLY AM NOT GOING TO DO ANYTHING TO UNDERMINE HER  
19 MANAGEMENT OF THIS LAWSUIT. BUT I HAVE TO SAY THAT I AM  
20 DISAPPOINTED IN ALL OF YOU, AND I TAKE HER AT HER WORD THAT YOU  
21 HAVE BEEN DIFFICULT, TO SAY THE LEAST. SO YOU NOW KNOW.

22                   WHAT'S THE REAL PREJUDICE AT THIS POINT? FOR PURPOSES OF  
23 THIS MOTION ALONE.

24                   **MR. GEYERMAN:** YOUR HONOR, IF THE ENHANCED POOL OF  
25 TRANSACTIONS ARE CONSIDERED, THEN THERE'S STILL SOME PLAINTIFFS

1 WHO WE WOULD SAY DO NOT CONTAIN STANDING.

2 **THE COURT:** RIGHT. BUT IF THEY ARE GIVEN LEAVE TO  
3 AMEND, THEN THEY WOULD, RIGHT? BECAUSE YOU HAVE THE INFORMATION  
4 NOW.

5 **MR. GEYERMAN:** SETTING ASIDE BROWN, HAGERT, ODORISIO  
6 AND WULFF WHO SUFFER FROM THE PRORATION ISSUE.

7 **THE COURT:** AND TO ARGUE THAT THEY HAVE THE 50 MILLION  
8 TRANSACTIONS, OR WHATEVER, AND SO THEREFORE THEY SHOULD READ YOUR  
9 MIND AND KNOW WHAT YOUR RELYING ON IS ABSURD.

10 **MR. GILMORE:** YOUR HONOR.

11 **THE COURT:** I DON'T WANT TO HEAR IT FROM EITHER SIDE.

12 **MR. GILMORE:** YOUR HONOR, I WILL OFFER MY APOLOGY  
13 FOR --

14 **THE COURT:** DON'T OFFER IT TO ME. OFFER IT TO JUDGE  
15 CORLEY WHEN YOU SEE HER TOMORROW.

16 **MR. GILMORE:** I WILL DO SO.

17 **THE COURT:** ALL RIGHT. MOVING TO NAVARRO.

18 WITH RESPECT TO DR. NAVARRO'S QUALIFICATIONS, HE SEEMS TO ME  
19 TO HAVE RELEVANT EXPERIENCE. IT MAY BE SOMEWHAT OUTDATED.  
20 SOUNDS LIKE THAT GOES TO WEIGHT MORE THAN TO ADMISSIBILITY.

21 THE REAL QUESTION I HAVE IS WHETHER HE'S DONE ENOUGH TO  
22 SUPPORT HIS OPINIONS. WHERE IS HIS REAL METHODOLOGY? IS HE  
23 SUPPOSED TO JUST GET ON THE STAND AND PONTIFICATE?

24 TWO MINUTES A SIDE, AND THEN I'M GOING TO GO TO MY NEXT  
25 CASES.

1 GO AHEAD.

2 MR. GILMORE: SHOULD I GO FIRST, YOUR HONOR?

3 THE COURT: IT'S YOUR EXPERT.

4 MR. GILMORE: YOUR HONOR, DR. NAVARRO HAS EXTENSIVE,  
5 RELEVANT EXPERIENCE HERE. AND HIS METHODOLOGIES, HE'S ONE  
6 LOOKING AT THE CONTRACTS AND DRAWING ON HIS UNDERSTANDING OF HOW  
7 THIS BUSINESS WORKS TO SAY THESE ARE USUAL AND CUSTOMARY PRICES  
8 AND THAT THEY -- THE LOWER U & C PRICING IS COMMON CLASS-WIDE AND  
9 THE HARM FROM CVS'S CONDUCT WOULD APPLY CLASS-WIDE.

10 HIS APPROACH IS VERY SIMILAR TO THE ONE THAT THE GARBE COURT  
11 WITH THE EXPERT FOR PLAINTIFFS IN THAT CASE UNDERTOOK.

12 THE COURT: IT LOOKS LIKE THAT EXPERT DID SIGNIFICANTLY  
13 MORE ANALYSIS THAN NAVARRO HAS.

14 MR. GILMORE: SHE MAY HAVE LOOKED AT A LARGER NUMBER OF  
15 CONTRACTS, BUT DR. NAVARRO LOOKED AT THE COMBINATION OF A SET OF  
16 CONTRACTS. I THINK I SAID EARLIER THAT IT WAS IN THE TEENS.  
17 THAT WAS ORIGINALLY, I THINK, SUBSEQUENT TO HIS ORIGINAL REPORT.  
18 HE LOOKED AT MORE BASED ON CONTRACTS THAT CVS CITED IN ITS  
19 OPPOSITION.

20 HE LOOKED AT THE CONTEMPORANEOUS RECORDS. HE LOOKED AT  
21 CVS'S DOCUMENTS, AND HE LOOKED AT WHAT THE CVS WITNESSES WERE  
22 SAYING. AND DRAWING ON HIS OWN EXPERIENCE HE APPLIED THAT  
23 EXPERIENCE TO THE RECORD AND SAID THAT THERE IS COMMON CONDUCT  
24 HERE.

25 THAT THE HSP PRICES FIT THESE DEFINITIONS OF USUAL AND

1 CUSTOMARY PRICE AND SHOULD BE REPORTED AS SUCH.

2 HE ALSO LOOKED AT THE RELEVANT FACTORS WITH RESPECT TO THE  
3 PROGRAMS THEMSELVES, THE PROGRAM ITSELF, AND THE POROUS NATURE,  
4 THE FACT THIS THESE PRICES WERE BEING CHARGED OUTSIDE THE  
5 PROGRAM, THE FACT THAT THE FEE WAS NOMINAL AND WASN'T EVEN  
6 UNIFORMLY COLLECTED.

7 AND HE SAID EVEN IF YOU CREDIT WHAT THE PBM'S SAID, GIVEN  
8 THESE CONDITIONS OF A MEMBERSHIP PROGRAM, ONE WOULDN'T,  
9 CONSISTENT WITH INDUSTRY STANDARDS, EVER BE ABLE TO EXCLUDE THESE  
10 PRICES AS USUAL AND CUSTOMARY PRICES.

11 **THE COURT:** RESPONSE --

12 **MR. GEYERMAN:** YOUR HONOR --

13 **THE COURT:** -- AND/OR ARGUMENT.

14 **MR. GEYERMAN:** -- WE AGREE WITH YOU THAT DR. NAVARRO  
15 HAS NOT DONE ENOUGH. WE AGREE. WE DON'T BELIEVE HE'S EMPLOYED  
16 REALLY ANY METHODOLOGY AT ALL. IN THE OPPOSITION BRIEF THE  
17 PLAINTIFFS STATE AT PAGE 12 THAT DR. NAVARRO PERFORMED THE SAME  
18 INDUSTRY SURVEY THAT WAS PROVIDED TO THE COURT IN GARBE.

19 FIRST OF ALL, DR. NAVARRO HIMSELF DOESN'T EVEN DESCRIBE WHAT  
20 HE DID AS PURPORTING TO PERFORM A SURVEY. IN SUPPORT OF THAT  
21 ASSERTION, THE PLAINTIFFS CITE TO ROBERT NAVARRO'S DECLARATION,  
22 PARAGRAPHS 35 TO 39.

23 IN THOSE FIVE PARAGRAPHS, TWO PARAGRAPHS RELATE TO  
24 COMMERCIAL CONTRACTS. NOT A SINGLE CVS TO PBM CONTRACT IS CITED  
25 IN THOSE TWO PARAGRAPHS ABOUT COMMERCIAL CONTRACTS.

1           WHAT IS CITED IS ONE PROVIDER MANUAL FROM MEDIMPACT, A PBM  
2 WHO CVS HAS DEPOSED IN THIS CASE AND WHO IS VICE PRESIDENT OF THE  
3 NETWORK SAID THAT THE HSP PROGRAM FELL OUTSIDE THE DEFINITION OF  
4 THE CVS MEDIMPACT CONTRACTUAL DEFINITION OF "USUAL AND CUSTOMARY  
5 PRICE."

6           IN THE OTHER THREE OF THE FIVE PARAGRAPHS THAT THE  
7 PLAINTIFFS CITE TO AS DEMONSTRATING HIS METHODOLOGY -- THIS IS  
8 PARAGRAPHS 37 TO 39 -- THOSE RELATE TO MEDICARE PART D AND  
9 MEDICAID.

10          DR. NAVARRO DOESN'T EVEN ADDRESS THE WRITTEN STATEMENT BY  
11 THE CENTER FOR MEDICARE AND MEDICAID SERVICES, WHICH IS REPORTED  
12 IN A DOCUMENT THAT WE ATTACHED TO OUR REPLY BRIEF AT EXHIBIT A.  
13 FOOTNOTE 26 OF THAT REPORT SAYS THAT CMS DOESN'T HAVE A STATED  
14 POLICY ONE WAY OR THE OTHER WHETHER OR NOT IF YOU HAVE A  
15 MEMBERSHIP PROGRAM THAT'S CHARGING A FEE, WHETHER THAT IS  
16 CONSIDERED YOUR USUAL AND CUSTOMARY PRICE.

17          SO WE THINK IT WOULD BE ODD, TO SAY THE LEAST, FOR SOMEONE  
18 TO BE RENDERING AN OPINION ABOUT WHAT WOULD BE REQUIRED BY  
19 MEDICARE WITHOUT EVEN ACKNOWLEDGING WHAT THE STATED POSITION IS  
20 OF CMS.

21          AS FOR MEDICAID, DR. NAVARRO CITES TO FOUR STATE MEDICAID  
22 DEFINITIONS OF USUAL AND CUSTOMARY PRICE. HE SAYS NOTHING ABOUT  
23 THE OTHER 46 STATES' DEFINITION OF USUAL AND CUSTOMARY PRICE.  
24 AND HE SAYS NOTHING ABOUT THE STATE OF TEXAS WHO, AS REFLECTED IN  
25 EXHIBIT B TO OUR REPLY BRIEF, TEXAS MEDICAID OFFICIALS TOLD CVS

1 CONTEMPORANEOUS WITH THE LAUNCE OF HEALTH SAVINGS PASS PROGRAM IN  
2 THE FALL OF 2008 THAT THEY AGREED THAT EVEN UNDER TEXAS'S  
3 DEFINITION OF "USUAL AND CUSTOMARY PRICE" FOR MEDICAID PURPOSES  
4 IT WAS NOT.

5 SO THIS IS ALL TO SAY I THINK THAT THERE'S NOTHING THERE IN  
6 TERMS OF THE METHODOLOGY. WE DON'T DISPUTE THAT DR. NAVARRO HAS  
7 EXPERIENCE WITH THE PBM INDUSTRY, GENERALLY. BUT WE'RE NOT  
8 CHALLENGING HIM FOR THAT BASIS. THIS IS A VERY NARROW ATTACK  
9 UNDER DAUBERT WHICH IS ANY OPINIONS ABOUT GENERIC DRUG MEMBERSHIP  
10 PROGRAMS. AND HE HAS ABSOLUTELY ZERO EXPERIENCE WHICH GENERIC  
11 DRUG MEMBERSHIP PROGRAMS. AND, THEREFORE, HE SHOULD NOT BE  
12 ALLOWED TO OPINE ON THAT ISSUE.

13 **THE COURT:** ALL RIGHT.

14 **MR. GILMORE:** YOUR HONOR, MAY I RESPOND VERY BRIEFLY?

15 **THE COURT:** THIRTY SECONDS.

16 **MR. GILMORE:** WITH RESPECT TO TEXAS, TEXAS FILED A  
17 SUIT. THE TEXAS ATTORNEY GENERAL FILED A SUIT AGAINST CVS.

18 **THE COURT:** TEXAS ATTORNEY GENERAL FILED A SUIT AND HAS  
19 ITS OWN CONTRACT THAT THEY CAN LOOK AT OR THAT A JUDGE CAN LOOK  
20 AT WITH RESPECT TO REPRESENTATIONS MADE THERE.

21 WE'RE MOVING ON.

22 OKAY. WITH RESPECT TO DOCKET 225, THE MOTION WITH RESPECT  
23 TO YOUR SCHEDULE.

24 **MR. GILMORE:** MS. SWEENEY IS GOING TO ADDRESS THE  
25 SCHEDULE CONSIDERATIONS, YOUR HONOR.

1                   **THE COURT:** ASSUMING FOR PURPOSES OF ARGUMENT THIS  
2 MOTION IS DENIED, MS. SWEENEY, HOW MUCH TIME DO YOU WANT TO  
3 FIGURE OUT WHAT YOUR NEXT STEPS ARE?

4                   **MS. SWEENEY:** I GUESS IT WOULD DEPEND IN PART UPON  
5 WHETHER THE MOTION WAS DENIED IN PART OR IN TOTAL, BUT PROBABLY  
6 45 DAYS, YOUR HONOR. S.

7                   **THE COURT:** OKAY.

8                   I'LL PUT YOU ON MY CALENDAR FOR MONDAY, MAY 1ST. THIS IS  
9 THE CMC CALENDAR AT 2:00 P.M., FOR A SCHEDULE.

10                  ARE YOU GOING TO ARGUE THE CALENDAR ISSUES?

11                  **MR. GEYERMAN:** YES.

12                  **THE COURT:** WHEN ARE YOU GOING TO BE PREPARED TO FILE A  
13 MOTION FOR SUMMARY JUDGMENT? THAT IS, WHETHER OR NOT THIS MOTION  
14 IS GRANTED.

15                  **MR. GEYERMAN:** OUR PREFERENCE IS TO SEE THE OUTCOME OF  
16 THE CLASS CERTIFICATION MOTION. BUT IN FAILING THAT, WHEN THE  
17 PARTIES WERE DISCUSSING A JOINT PROPOSAL, THE PLAINTIFFS AT A  
18 MINIMUM WERE SAYING THAT MAY 9TH, I BELIEVE, MAY 8TH OR IN 9TH  
19 WAS WHAT THEY WERE AT. BUT, AGAIN, WE BELIEVE --

20                  **THE COURT:** MAY 8TH OR 9TH FOR WHAT?

21                  **MR. GEYERMAN:** WELL, BEFORE AN ORDER --

22                  **THE COURT:** I AM ASKING YOU WHEN YOU -- WELL, LET ME  
23 ASK YOU THIS QUESTION: ARE YOU GOING TO FILE A MOTION FOR SUMMARY  
24 JUDGMENT IF THE CLASS IS NOT CERTIFIED?

25                  **MR. GEYERMAN:** WE WOULD, YOUR HONOR.

1                   **THE COURT:**   WHAT IF THEY ARE GIVEN ANOTHER OPPORTUNITY  
2   TO FILE?

3                   **MR. GEYERMAN:**   IF THEY ARE GIVEN AN OPPORTUNITY TO FILE  
4   AN AMENDED COMPLAINT FOR A DIFFERENT CLASS?

5                   **THE COURT:**   OR A REVISED MOTION FOR CLASS  
6   CERTIFICATION.

7                   **MR. GEYERMAN:**   I THINK WE WOULD LIKELY THEN AWAIT THAT  
8   MOTION BEFORE MOVING FOR SUMMARY JUDGMENT.

9                   **THE COURT:**   ARE YOU WORKING ON YOUR SUMMARY JUDGMENT  
10   MOTION NOW?

11                   **MR. GEYERMAN:**   WELL, WE HAD STARTED IT WHEN WE RECEIVED  
12   YOUR HONOR'S ORDER THAT SAID WE WOULD TALK ABOUT THIS AND YOU  
13   INTENDED TO GRANT RELIEF.   WE PUT PENCILS DOWN A LITTLE BIT WITH  
14   RESPECT TO THAT.   BUT WE DON'T WANT TO DELAY THE CASE, BUT WE DO  
15   THINK IT MAKES SENSE TO SEE WHAT IS HAPPENING WITH CLASS  
16   CERTIFICATION.

17                   **MS. SWEENEY:**   YOUR HONOR, JUST TO CLARIFY, PLAINTIFFS  
18   PUT TOGETHER A PROPOSED SCHEDULE WHICH WE COULD SHOW TO YOUR  
19   HONOR THAT WAS BASED ON THE UNDERSTANDING THAT THE COURT GRANTED  
20   THE MOTION FOR CERTIFICATION.   AND SO WHAT I UNDERSTOOD YOUR  
21   QUESTION TO ASK WAS IF THE COURT DENIES IN PART THE MOTION FOR  
22   CLASS CERTIFICATION, HOW MUCH TIME DO PLAINTIFFS NEED TO PUT  
23   TOGETHER A REVISED MOTION IF THEY DECIDE TO DO THAT.   SO IF I  
24   MISUNDERSTOOD THAT, YOUR HONOR, I WOULD LIKE TO HAND UP THE  
25   PROPOSAL THAT WE HAD PREPARED.

---

1                   **THE COURT:** WELL, LET ME SEE IT. AND THEY HAVE SEEN  
2 IT?

3                   **MR. GEYERMAN:** NO, WE HAVEN'T, YOUR HONOR.

4                   **MS. SWEENEY:** I HAVE ANOTHER, YOUR HONOR.

5                   **THE COURT:** WELL, THAT'S DIFFERENT. LET ME ASK YOU  
6 THIS, JUST TO MAKE SURE WE'RE ON THE SAME PAGE, MS. SWEENEY.

7                   **MS. SWEENEY:** YES.

8                   **THE COURT:** IF THE MOTION IS DENIED, I UNDERSTOOD YOUR  
9 RESPONSE TO BE THAT YOU WOULD NEED 45 DAYS TO DECIDE WHAT YOU ARE  
10 GOING TO DO.

11                   **MS. SWEENEY:** WE WOULD NEED 45 DAYS TO SUBMIT A REVISED  
12 MOTION FOR CLASS CERTIFICATION.

13                   AND TO CLARIFY, YOUR HONOR, THAT WOULD BE AT LEAST 45 DAYS  
14 FROM THE DATE OF THE ORDER.

15                   **THE COURT:** I UNDERSTAND.

16                   WELL, LET ME DO THIS BECAUSE I HAVE PEOPLE WAITING.

17                   GO AHEAD. WHAT DO YOU HAVE TO SAY?

18                   **MR. GEYERMAN:** YOUR HONOR, WE CAN BE PREPARED TO FILE  
19 OUR MOTION FOR SUMMARY JUDGMENT BY THE END OF APRIL.

20                   **THE COURT:** ALL RIGHT. I'VE TAKEN THESE DOWN. THE  
21 REQUEST, JUST SO I CAN CLEAR MY DOCKET, THE MOTION, THE  
22 ADMINISTRATIVE MOTION IS DENIED. BUT TRIAL DATE IS VACATED. THE  
23 SUMMARY JUDGMENT, OBVIOUSLY THAT DATE IS VACATED. I'LL SUBMIT A  
24 NEW SCHEDULE AFTER I THINK ABOUT WHAT YOU'VE SAID TODAY.

25                   OKAY? ALL RIGHT. THANK YOU.

1                   **MR. HEARD:**   THANK YOU, YOUR HONOR.

2                   **MS. SWEENEY:**   THANK YOU, YOUR HONOR.

3                   **MR. GILMORE:**   THANK YOU, YOUR HONOR.

4                   (THEREUPON, THIS HEARING WAS CONCLUDED.)

5                   STENOGRAPHY CERTIFICATION

6                   "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
7                   FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."

8                   MARCH 8, 2017  
                    KATHERINE WYATT

---

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25